Supreme Court, U.S.
FILED

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No. 03 571 OCT 14 2003

In The
Supreme Court of the United States

SOUTH COAST CAB CO., INC.,
a California Corporation, et al.,

Petitioners,

vs.

THE CITY OF ANAHEIM, etc., et al.,

Respondents.

On Petition For Writ Of Certiorari
To The California Court Of Appeal,
Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Whether certiorari is appropriate to secure uniformity of decision between the federal and state courts so as to preserve Petitioners' *Sherman Antitrust Act* claims where *both* courts are refusing to exercise jurisdiction, where all have been on notice and there will be no prejudice.

(2) Whether the city of Anaheim's status as a "charter city" allows it to be exempted from constitutional guarantees of due process and equal protection in the implementation of a taxicab franchise system pursuant to a public bidding process, the direct consequence of which is to create combinations and contracts in restraint of trade.

(3) Where the California Court of Appeal had already opined in this protracted case that Petitioners might have viable antitrust claims, whether Petitioners may challenge the subsequently-operable Anaheim taxicab franchise on constitutional bases even though Petitioners did not submit a franchise bid.

(4) Whether evidence of antitrust activity on the part of the City of Anaheim, including successive alterations to its Municipal Code tracking Petitioner's taxicab applications, is relevant to the analysis of "futility" as an excuse for the "failure to pursue administrative remedies".

LIST OF PARTIES AND CORPORATE DISCLOSURE UNDER RULE 29.6

Corporate Disclosure

Petitioner SOUTH COAST CAB CO., INC. is a "stand-alone" California corporation; i.e., it has no "parent" corporation, nor is it a "parent corporation" to any other business entity. It is a privately-held company. There is no parent corporation nor publicly-held company that owns 10% or more of its stock.

Petitioners SAVVAS RODITIS and IRENE RODITIS are individuals – husband and wife.

Petitioners are represented by Maryann Cazzell, Esq., CA Bar #128780 of the firm Cazzell & Associates, Attorneys, 2230 W. Chapman Ave., Ste. 200, Orange, CA 92868, tel. (714) 385-2871 and fax (714) 385-2872.

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LIST OF PARTIES AND CORPORATE DISCLOSURE UNDER RULE 29.6 – Continued

Mr. Johnson also represented former Defendants RICHARD LaROCHELLE and JOHN POOLE, who were dismissed from the state court case following the decision in appellate case #G030079. Mr. Johnson represents all three such parties (The City of Anaheim and Messrs. LaRochelle and Poole) in stayed U.S. District Court, Central District of California case #SACV99-416GLT (ANx).

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The Opinion of the California Court of Appeal for the Fourth Appellate District, Division Three in appellate case case #G030551, filed 4/17/03, and the opinion from the same court in appellate case #G026197, filed 12/19/00, both of which are unpublished, are reproduced in part (i) of the Appendix. Included in part (ii) of the Appendix are Orders of the U.S. District Court, Central District of California entered in related case #SACV99-416GLT(ANx) dated 8/18/03 and 3/2/00.

STATEMENT OF BASIS FOR JURISDICTION

(a) *Date Judgment or Order Entered.*

7/16/03 (date of California Supreme Court Order denying review of the 4/17/03 decision of the Court of Appeal in case #G030551).

(b) *Order re: Rehearing or extension*

No extensions have been given nor requested pertinent to the within Petition for Writ. On 5/1/03 Petitioners submitted to the Court of Appeal a Petition for Rehearing and/or Modification of that court's 4/17/03 Opinion in case #G030551, which was denied without comment on 5/19/03.

(c) *Not Applicable* – No cross-petition has been filed.

(d) *Statutory provision governing jurisdiction:*

This Petition for Writ pertains to the decision of the Court of Appeal set forth in its Opinion in case #G030551 filed 4/17/03. Petitioner's timely Petition for Review to the California Supreme Court submitted on 5/23/03 was

denied without comment on 7/16/03. The within Petition is timely as submitted within ninety days of the latter Order denying review, pursuant to U.S. Supreme Court Rule 13(1) and 28 U.S.C. section 2101(c).

Jurisdiction of this Honorable Court is invoked under U.S. Supreme Court Rule 10(c), since a state court has decided an important question of federal law that has not been, but should be, settled by this Honorable Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Honorable Court.

Jurisdiction is also invoked under 28 U.S.C. section 2104, which provides that a review by this Honorable Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree review had been rendered in a court of the United States.

(e) *Not applicable. No notifications under Rule 29.4 have been made*, because the United States is not a party to this proceeding, nor is any federal department, office, agency, officer or employee, a party to this proceeding.

VERBATIM CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS IN CASE

As they are voluminous, the text of each of the following is set forth in subpart (v) of the Appendix:

Fifth Amendment to the U.S. Constitution

Fourteenth Amendment to the U.S. Constitution

15 U.S.C. 1(1) (part of the *Sherman Antitrust Act*)

42 U.S.C. section 1983

Cal.Govt.Code section 53075.5

Cal.Publ.Util.Code sections 6001 and 6003 (part of the *Broughton Act*)

Anaheim Municipal Charter sections 1400 & 1405

Anaheim Municipal Code sections 1.03.060 (1991),

4.72.020, -.030, -.040 and -.200 (1981); sections 4.72.010, -.020, .030, -.040, -.080, -.100, -.110, -.120, -.130 and .140 (enacted February 10, 1998); sections 4.72.045 (enacted October 20, 1998); sections 4.73.040, -.045, -.050, -.070 and -.210 (adopted April 24, 2001).

STATEMENT OF CASE – FEDERAL QUESTION INFORMATION

After years of applications, administrative procedures and litigation, Petitioner, then an eleven-year-old family-owned but established taxicab business based in the Anaheim, California area, had just finally secured permits to operate in that City through judicial edict from the California Court of Appeal in case #G026197, only to have its permits "phased out" by The City pursuant to a newly-enacted Anaheim taxicab franchise system *the short application period for which had expired on 10/30/00, before the ruling in case #G026197 was issued on 12/19/00 and before the franchise ordinance was ever drafted or adopted on 4/24/01* (Appendix, 74-82).

Petitioner did not apply for a franchise during the limited Request for Proposal ("RFP") application period in the Fall of 2000 because Petitioner was convinced that The City would never willingly award it a franchise, believing the whole franchise idea to be just the latest pretense in years of impediments placed before it by The City, conceived in order to keep Petitioner out through "legal means," which understanding was buttressed by the ambiguity of the RFP application and the uncertainty of the whole process (appearing to afford automatic entry to the "duopoly" taxicab providers, and seeming to require immediate compliance with onerous and cost-prohibitive franchise requirements which Petitioner understood were promulgated to make it impossible for it to ever submit a compliant bid). Despite repeated constitutional challenges, the trial court and appellate court found that Petitioner's failure to have submitted an RFP bid completely barred all of its claims.

Petitioner raised federal questions at all stages of its litigation (except where prevented by interim rulings). Petitioner's first-draft complaint filed in October 1998 included causes of action under the *Sherman Act* as well as a claim for violation of the due process guarantees afforded to it under the Fifth and Fourteenth Amendments to the U.S. Constitution [Clerk's Transcript from appellate case #G026197 "[CT1]," pages 2-36]. The trial court effectively sustained demurrers to these causes of action without leave to amend, limiting the Complaint to a Petition for Writ of Administrative Mandate [Opinion in case #G026197, App. 22-23]. Petitioner filed its federal complaint (case #SACV99-416GLT(ANx)) in March 1999 seeking damages and injunctive relief under 42 U.S.C. section 1983, but that action was stayed, *twice*, based upon

the abstention doctrine of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941) and the pendency of the state court action, over Petitioner's objection [App., 47-49].

On review, the Court of Appeal in relevant part reversed, declared the Anaheim taxicab ordinance void for vagueness, directed the trial court to enter an order requiring the City of Anaheim to give Petitioner (117) taxicab permits, effectively reinstated Petitioner's *Sherman Act* claims on the grounds that they were wrongfully dismissed and suggested that Petitioner file a Third Amended Complaint [12/19/00 Opinion in #G026197, App. 40], which Petitioner did, again including a *Sherman Act* cause of action [Clerk's Transcript from appeal numbers G030551 "[CT3]," pages 40-104.]

Again, the trial court dismissed Petitioner's *Sherman Act* cause of action, first granting Summary Adjudication on the damages portion of that claim on the grounds that Anaheim was immune from antitrust damages as a matter of law [CT3, 793] and next, granting Judgment on the Pleadings as to the balance of said federal antitrust claim on the eve of trial on the grounds that "[T]he Court lacks subject matter jurisdiction and jurisdiction resides in the federal court" [CT3, 781]. *United States Golf Association v. Arroyo Software Corporation* (1999), 69 Cal.App.4th 607, 623-24, 81 Cal.Rptr.2d 708, 717-18). The trial court overruled Petitioner's arguments that The City should be "equitably estopped" from any rights to challenge the state court's jurisdiction by litigating there until a month before trial and obtaining federal court stays, and that The City

had thus "elected" its forum [CT3, pages 707-710].[1] Petitioner appealed the dismissal of such claims, along with its appeal from the trial court order denying the Motion for a Preliminary Injunction to halt the mandatory reduction in the number of Petitioner's Anaheim taxicab permits aspect of the implementation of the franchise [CT3, 804-806].

In its 4/17/03 Opinion in case #G030551, the Court of Appeal declined to rule upon Petitioner's challenge of the dismissal of its *Sherman Act* claims, evidently determining that the appeal was prematurely taken on this point and refusing to exercise discretionary jurisdiction over this question. Hence there has been no state appellate court review of the dismissal of these federal claims.

Petitioner then sought to reopen federal case #SACV99-416GLT(ANx), to amend its complaint there to set forth its *Sherman Act* claim and to obtain a temporary restraining order preventing the reduction in the number of Petitioner's Anaheim taxicab permits pending further Order of Court. The district court refused to lift the abstention stay that it had previously imposed, citing to the case of *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 467-68 (1964) and positing that Petitioner had not made a clear reservation of its federal claims in

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[1] Interestingly, the trial court, having determined that it had never had jurisdiction over these claims in the first place, did *not* go back to try to "cure" its prior oversight in entering summary adjudication of issues *as to the damages portion of Petitioner's Sherman Act claim* by, e.g., vacating its prior order and reinstating that portion of the claim, *then* granting judgment on the pleadings as to the damages claim as well.

its state court complaint [8/18/03 Order in case #SACV99-416GLT(ANx), App. 42-45]. Thus the federal court also refused to exercise jurisdiction over Petitioner's *Sherman Act* claims, and likewise refused to reopen Petitioner's 42 U.S.C. section 1983 claims, which were never a part of the state court action.[2] *Ibid.*

SUMMARY OF ARGUMENT

Certiorari is necessary to secure uniformity of law as to which of the courts (state or federal) has jurisdiction over Petitioner's *Sherman Act* claims, because, presently, *both* courts are refusing to address these issues. Each is instead directing Petitioner to the other court, and petitioner *cannot* get these claims heard even though earlier in the proceedings the court of appeal held that Petitioner had plead a prima facie antitrust claim, concurrent with its Opinion that Anaheim's taxicab licensing ordinance was void for vagueness, and that Petitioner should have received 117 Anaheim permits *from its application in April 1999.*

[2] The district court improperly surmised that Petitioner *had ever maintained* a section 1983 claim in state court, concluding that there had been no *England* reservation as to that claim and that it therefore was waived in federal court as well (8/18/03 Order, page 4). Instead, the reason that Petitioner did not mention the "section 1983 claim's status in state court" was because Petitioner *never brought* this claim in state court, but relied upon the federal court's jurisdiction over the matter. At the time that case number SACV99-416GLT(ANx) was filed in March 1999, the state court had already held that Petitioner's only viable cause of action was one of petition for writ of administrative mandate, such that Petitioner *could not* have put a section 1983 claim in its state court complaint at that time.

Anaheim must still adhere to the constitution in its implementation of a municipal taxicab franchise done under a public bidding process. Fundamental fairness and due process guarantees require a "close look" at this procedure which necessarily puts a restraint on trade. Anaheim's status as a "charter city" should not be allowed to provide an insulation from all challenges, especially when it has stepped outside of its "home rule" powers in favor of adopting countywide taxicab regulations, so that it should be subject to the *Broughton Act*.

Anaheim's enactment of what might seem to be a facially-valid taxicab franchise ordinance does not vitiate all of its prior wrongs against Petitioner and should not prevent it at *least* from pursuing its claim for damages and challenging the constitutionality of the ordinance, at least as applied to it. Nor may Anaheim's protracted and substantial history of unfairness and unequal treatment in its evaluation of Petitioner's many Anaheim taxicab licensing applications, be ignored in evaluating key issues: the motivation behind conversion to the franchise system, the ambiguity of the RFP and Petitioner's interpretation of the same, and the omission of specific key criteria from the RFP *from the subsequently-drafted and enacted franchise*, all of which caused Petitioner to *not* apply on the grounds of futility and because Petitioner believed that an application was cost-prohibitive because it had to already be compliant when it submitted a bid. Subjective analysis is inherent in evaluating a statute for constitutional vagueness. A "totality of the circumstances" analysis, *made objectively verifiable by a review of the progression of changes to the Anaheim Municipal Code to respond to Petitioner's ongoing applications and complaints,* compels the conclusion that Petitioner was excused from making

application for the franchise because futile. Subsequent events such as Anaheim's selection of an incumbent which submitted an incomplete and thus non-compliant bid, Anaheim's eight-month delay in waiting for a favored company to emerge from bankruptcy and The City's award of a franchise to a third company that never met the minimum and stated most important criteria of the RFP (the maintenance of a computerized dispatch system) reveals the franchise for the pretext that it was.

ARGUMENT

I. Certiorari is appropriate to secure uniformity of opinion by preserving Petitioners' *Sherman Act* claims, because it was inappropriate to deny Petitioner access to *both* state and federal courts for lack of jurisdiction, where all involved have been on notice of this claim for years and would not be prejudiced from an order allowing it.

Sherman Act and federal civil rights claims are "federal questions" of which the federal courts have "original jurisdiction" under 28 U.S.C. section 1331.

An adequate if inexact rendition of the relevant procedural history of Petitioner's attempts to litigate its 42 U.S.C. section 1983 claim in federal court in case #SACV99-416GLT(ANx), and its more recent attempt to reopen that case and to add its *Sherman Act* claims to that complaint (once the state courts made clear their refusal to exercise jurisdiction over those claims), is set forth in the 8/18/03 Order in case #SACV99-416GLT(ANx) (App. 42-46).

Now, as noted under the summary above, *neither* the state nor federal court is accepting jurisdiction, and Petitioner's *Sherman Act* claim has become the proverbial "man without a country," even though it had already received the proverbial nod from the same court of appeal as a potentially viable claim (Opinion in #G026197, App., 28 & 29).[3] Direction from this Honorable Court is thus respectfully requested to ensure preservation of Petitioner's claim. No prejudice will result to Respondents, as they have been on actual notice of and have been defending the claim for *years* (*Ibid.*, App 42-46).

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[3] Because it held the Anaheim taxicab statute unconstitutional and basically directed Anaheim to give Petitioner its 117 taxicab permits, and because under *Anaheim Municipal Code* section 4.73 none of those permits would be "sunsetted" until May 31, 2002, a necessary corollary to this ruling is that *at a minimum* Petitioner had a *prima facie* claim for damages for its lost income and investment opportunity, and diminution in goodwill caused by it having been deprived of up to 117 permits from June 1999 (the Anaheim taxicab ordinance requiring a hearing on an application within 60 days) until at least March 27, 2001 when it finally received the permits, *almost two years, which losses were proximately caused by The City's enforcement of the unconstitutional taxicab ordinance.* But under the present posture of both the state *and* federal court cases (disallowing the *Sherman Act* and section 1983 claims), Petitioner is left remediless to seek to recoup these losses *despite the whole question of the franchise.*

II. The City of Anaheim is not exempt from complying with the constitution and relevant franchise laws in its implementation of a municipal taxicab franchise which necessarily creates combinations and contracts in restraint of trade; guidance is needed as there is no legally-established industry standard intended to ensure constitutional protection.

A city may not deprive a person of equal protection of the laws. U.S.Const. amend. XIV. There is no "per se" municipal exemption from antitrust laws. *Fisher v. City of Berkeley* (1984), 37 Cal.3d 644, 658-59, 209 Cal.Rptr. 682 (Opinion in #G026197, App. 29). Nor may administrative agencies – here, Code Enforcement "Staff" and LaRochelle) and The City's "ad hoc taxicab need or necessity committee" – engage in a "free-for-all." Agencies are also obligated to act within constitutionally mandated limits in administering the law (*Jaffe v. Unemp. Ins. App. Bd.* (1984), 156 Cal.App.3d 719, 723, 202 Cal.Rptr. 812); "an administrative agency's obligation to adhere to the Constitution . . . extends to the agency's application of legislation to the facts presented." *Southern Pac. Trans. Co. v. Publ. Util. Com.* (1976), 18 Cal.3d 308, 134 Cal.Rptr. 189.

Anaheim notes that since it has elected to be a "charter city" under 11 Cal. Const. art. 5, the adoption of the franchise ordinance itself was a "legislative act" (*see, e.g. Empire Waste Management v. Town of Windsor* (1998), 67 Cal.App.4th 714, 718, 79 Cal.Rptr.2d 262, 264 fn. 1, concerning the public right of referendum; Art. 11 Cal. Const. section 3(a)), performed under Anaheim's "home

rule" powers.[4] Respondent maintains that it therefore need not conform to any state or federal guidelines meant to ensure fairness.

The *Broughton Act* specifically requires that the granting of a franchise must be fair and unbiased; the inclusion of provisions in an RFP that tend to favor one applicant over another, are expressly forbidden. A City Council cannot grant a franchise without "competitive bidding." *San Diego v. Kerckhoff* (1920), 49 Cal.App. 473, 193 Pac. 801.

Anaheim claims that section 1.02.210 of the Anaheim Municipal Code ("AMC") enabled it to award franchises on whatever terms it wanted, and that it is not subject to the provisions of the *Broughton Act* (Cal.Publ.Util.Code sections 6001 *et seq.* (*see* App. 58 & 59) which ". . . provide(s) proper procedures to follow when other laws empower these local governments to grant franchises" (*Shell Cal. Pipeline Co. v. City of Compton* (1995), 35 Cal.App.4th 116, 41 Cal.Rptr.2d 753) and prevents "discrimination or favoritism in offering" a franchise (Cal.Publ.Util.Code section 6003).

But under the general rules of statutory construction (*First St. Plaza Partners v. City of Los Angeles* (1998), 76 Cal.App.2d 626, 65 Cal.App.4th 650 (modified on denial of rehearing)[5]), since there is nothing inconsistent with

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[4] Please see discussion under point (3) concerning Anaheim's lack of standing to insist on an exhaustion of administrative remedies since it enacted this law.

[5] This case held that a city that has adopted a charter also remains subject to state statutes, except with regard to "municipal affairs" governed by the charter.

Anaheim's general franchise-enabling ordinance and the provisions of the *Broughton Act*, the provisions of the AMC do not "govern over" the more specific provisions of the *Broughton Act* but rather the latter provide an aid for interpretation of AMC 1.02.010. State statutory and case law can provide guidance (*see, e.g., City of San Diego v. Southern Cal. Tel. Corp.* (1954), 42 Cal.2d 110, 117, 266 Pac.2d 14, 20. (the *Broughton Act* was applicable even to a charter city where the charter did not provide a procedure for awarding the franchise in question (here, the taxicab franchise ordinance was not enacted until later)) and *Leslie v. Superior Court* (1999), 73 Cal.App.4th 1042, 87 Cal.Rptr.2d 313 (counties may not enforce local regulations that contradict provisions of the Cal. Public Utilities Code).)

Anaheim admits that it is subject to the statewide taxicab ordinance, Cal. Gov't Code section 53075.5 (App., 54-58), which sets forth a comprehensive scheme for taxicab regulations, intended to promote and ensure the "health, safety and welfare" of its citizens and residents. While section 53075.5 allows delegation of taxicab regulation duties to a city "or county;" *Anaheim already delegated and legislated under section 53075.5, by participating in the creation of the Orange County Taxi Administration Program ("OCTAP") and the adoption of its Regulations in February 1998* (*see* Appendix, 66-70 [Second Administrative Record ("[AR2]", page 64].) OCTAP already has the field covered on ensuring full compliance with every single term of section 53075.5, from drug testing to driver licensing, insurance coverage, and beyond [AR2, 64-70]. In fact, Anaheim relied upon OCTAP to keep track of The City's taxicab operators insurance matters [Second Administrative Record ("AR2"]), pages

345-346].[6] *Thus Anaheim has lost its ability to further "legislate" in this field*, "charter" city or not, and cannot break free of the *Broughton Act*. Even Anaheim's own franchise promised a "competitive process" [AR2, 801]; the RFP and the responsive applications each were to become a part of the franchise ordinances [RFP page 2 (AR2, 859)].

A major and prevalent problem with the RFP procedure, here and in the industry is that even though RFPs ultimately are incorporated into and become a part of municipal or county ordinances, they are characteristically drafted by non-elected Staff personnel, are precatory in nature and are often vague and ambiguous, not actually supplying the requisite due process notice of what is or is not required of a candidate in order for it to submit a responsive and competitive bid, which it must nonetheless do in a short time frame.[7]

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[6] Obviously, Anaheim had full faith and confidence in the integrity of OCTAP, or its would never have entrusted to OCTAP the so important task of conducting a taxicab need or necessity survey back in 1999 (Opinion, page 15, fn. 7) and purporting to rely so heavily on its results [AR2, 44-46].

[7] True to form, the Anaheim taxicab RFP set forth certain minimal criteria for the awarding of a franchise, but the RFP was not complete. Responsive RFP franchise bids had to be submitted between 9/20/00 and 10/30/00, yet the Opinion in case #G026197 awarding Petitioner its Anaheim taxicab permits was not issued until 12/19/00, *after it was too late for Petitioner to submit a franchise bid.* The franchise ordinance itself was not introduced until 4/17/01 and not adopted until 4/24/01; *although it was altered in an effort to meet the pronouncements of unconstitutionality raised in the 12/19/00 Opinion in case #G026197, Petitioner was never given a chance to submit an RFP bid after that Opinion was entered.*

It is submitted that the need for this Honorable Court's intervention to secure uniformity of law in the field of taxicab operations, the determination of "need or necessity" and the award of public taxicab franchises, is warranted. While the Cal.Publ.Util.Code sets forth detailed enabling and regulatory statutes for the operation of *shuttle vans* (*see, e.g.,* sections 5352 *et seq.*, ("TCP" permits), sections 1031 *et seq.*, ("PSC" operations), section 1031 ("certificates" of "public convenience and necessity") and sections 5352 *et seq.* (specifically *excepting* applicability to taxicabs)), it is settled that this statute has no application to taxicabs. *In re: Martinez* (1943), 22 Cal.2d 259, 138 Pac.2d 10 (*overruled on other grounds in People v. Western Air Lines, Inc.* (1954), 42 Cal.2d 621, 268 Pac.2d 723.) Indeed, while even Anaheim's selected taxicab consultant reported the increase of the use of taxicab franchise systems [CT3, 327-328], **there seems to be no regulatory nor authoritative law on the subject**.

Petitioner referenced the dearth of such law or guidelines in its Petition for Review submitted to the California Supreme Court (*denied* 7/16/03), referencing specific instances of the rise of the use of public livery franchises initiated by RFP bidding processes in the Greater Los Angeles area, including challenges to the constitutionality of the Los Angeles World Airport ("LAX") livery RFP, and an ongoing challenge to the taxicab RFP at the John Wayne Airport in Santa Ana, California [CT3, 533-538]. In fact, as noted in the Petition for Review and in case #G030551, after the Opinion in case #G026197 was filed, The City of Torrance held hearings pertaining to the constitutionality of own taxicab ordinance (Torrance Municipal Code section 33.17.050); to this date, doubtless because there are no other known standards, Torrance,

after making appropriate disclaimers, continues to cite to the *unpublished* decision in case #G026197 as providing the industry standard of taxicab "need or necessity" (*see, e.g.*, Minutes of 9/25/01 License Review Board ("LRB") meeting, pages 1, 2 & 3, 9/25/01 Minutes of a regular meeting, pages 2, 4, 5, 6 & 7, 11/6/01 Minutes of LRB Meeting, and 11/6/01 Minutes of a regular meeting, pages 3 & 4) (Judicial Notice granted pursuant to Petitioner's 1/10/03 Motion).

Even in this very case (OSCS case #800359), uniformity of decision is lacking. In the Opinion in case #G026197, the court of appeal noted the "constitutional infirmity of vagueness is that 'fundamentally legislative decisions' are made at the 'point of enforcement' rather than enactment" (citation omitted) and decried the "danger of discretion" (App. 31), criticized a "standard that virtually invites arbitrary and selective enforcement" and struck down an ordinance which was " . . . hopelessly procrustean and manipulable by local officials 'at the point of enforcement,' i.e., by the city council on an ad hoc basis" (App. 35). *And yet in this same case* (on appeal in case #G030551), the same court of appeal is now effectively sanctioning the same "full discretion" given to the very same two enforcement personnel to arbitrarily and selectively create, implement and manage the Anaheim taxicab franchise, *Staff's* "show," with impunity. It is inconsistent to, figuratively speaking, now "hand the baton back" to Staff!

Also inconsistent is the Court of Appeal's new finding that Petitioner's "likelihood of success on the merits . . . essentially . . . is nil" (4/17/03 Opinion, App. 8), when that same tribunal on the basis of the same evidentiary showing, granted Petitioner injunctive relief (which requires a showing of a likelihood of success on the merits), issuing a

Stay on or about 5/28/02 pursuant to a Petition for the Writ of Supersedeas, etc. and thereafter issued a formal injunction.

III. In light of the factual and procedural history of Petitioner's treatment by Anaheim and the prior court of appeal finding that Petitioner might have viable antitrust claims, it may challenge the Anaheim taxicab franchise for vagueness and for violation of due process protections even without having submitted a franchise bid.

In the face of an "exhaustion" defense, there are "*exceptions for unusual factual circumstances*" where constitutionality is challenged. *Board of Police Commrs. v. Sup. Ct. (Easebe Enterprises)* (1985), 168 Cal.App.3d 420, 431-432, 214 Cal.Rptr. 493 (emphasis added) (dicta).

> Parties have argued that exhaustion of administrative remedies should be excused whenever the constitutionality of a statute is raised . . . (citations omitted). This argument relies on Cal Const art iii, section 3.5, which provides that an administrative agency . . . , does not have the power to declare a statute:
>
> *Unconstitutional or unenforceable on the basis of its being unconstitutional; or
>
> *Unenforceable on the basis of its preemption by federal law.

CEB, *California Administrative Hearing Practice*, "Decision and Review," section 8.114 (2d ed., as updated 4/02).

That treatise explains in *dicta* that exhaustion is not required where the challenge is made to the agency's

procedures (*Chrysler Corp. v. New Motor Vehicle Bd.* (1979), 89 Cal.App.3d 1034, 1039, 153 Cal. Rptr. 135; *State v. Superior Court* (1974), 12 Cal.3d 237, 250, 115 Cal.Rptr. 497) or to the constitutionality of an agency regulation or guideline, and further opines that "another exception applies when an agency challenges the constitutionality of any statute because to permit an agency of legislative origin to declare a legislative statute unconstitutional would violate the separation of powers doctrine" (citations omitted). *Loc. cit.*

In *Sail'er Inn v. Kirby*, (1971), 5 Cal.3d 1, 17, 95 Cal.Rptr. 329, the court invalidated the challenged legislation under the Equal Protection Clauses of both the State and Federal Constitutions, because "a fundamental interest – the right to work – is involved, and the classification is strictly scrutinized." Here, strict scrutiny is indicated because Petitioner *already had legally procured* its 117 Anaheim permits and was operating in the City, before the franchise ordinance was ever introduced, and thus had a "fundamental vested right" to them. *Drummey v. State Board of Funeral Directors* (1939), 13 Cal.2d 75, 87 Pac.2d 848.

The Anaheim taxicab franchise RFP failed to meet each of the constitutional tests raised by Petitioner:

(a) Vagueness

The RFP was voidable for vagueness because it could not be ascertained what action must be taken by Petitioner in order to comply with its terms. *Grayned v. City of Rockford* (1972), 408 U.S. 104, 108. The terms of the ordinance *were not even decided* as of the time of the RFP application deadline; rather, Anaheim Municipal Code

("AMC") section 4.73 was "first introduced" at the 4/17/01 City Council meeting [AR2, 484], half a year later. The Anaheim City Attorney readily admitted to the City Council *after the RFP deadline had run* that the ordinance itself would contain "a lot of things" that "you can't point to right now in the RFP" [AR2, 385].[8] There was also much uncertainty concerning the application of any "grandfather provision" (*see* discussion below). There was also vagueness about the use of "ultra low emission vehicles" (ULEV's) [AR2, 338 & 363].

(b) Grandfather provisions violated equal protection

The equal protection clause requires that persons under like circumstances be given equal protection in the acquisition and enjoyment of property.

Page 1210 of the Consultant's 7/20/00 Recommendations concerning the franchise [First Administrative Record ("[AR1]"), pages 1199-1251] suggested that the Council allow the "two existing operators" to "automatically continue under a franchise system provided they meet the RFP requirements;" the RFPs were to include "components and criteria *as recommended by Schaller*" (emphasis added) [AR1, 1430]. The "EVALUATION CRITERIA" [AR1, 1645] provided that the Selection Committee would give "special emphasis" to those with

[8] Even after the RFP had been circulated, various City Council members still wanted to negotiate its terms. Councilperson Frank Feldhaus later protested in open session, that he "probably wouldn't have voted for it in the first place if I didn't think I could amend it later" [AR2, 400].

Anaheim experience. Likewise, The City's last pre-RFP word on the subject (on 8/29/00), was that "b. Any incumbent taxi service provider . . . shall be eligible to obtain a franchise for the same number of taxicabs" [AR1, 1643-1644], and afforded the incumbents up to 25 percent for experience [AR1, 1652; AR2, 485]. Thus when The City voted on whether or not to proceed, the "duopoly" taxicab operators were automatically going to receive as many franchise stickers as they then had taxicab permits [AR2, 214, 220, 334, 336, 337, 338 & 362].[9] Some "level playing field"![10] As only "up to three" franchises were to be awarded, this meant that for all practical purposes there was only one "new" company to receive a franchise, and Petitioner already knew that if there *were* a third franchisee, it would be "American Taxi" (*see* discussion *infra*), which ALSO *had "grandfather" experience operating in Anaheim, since the principal was the prior manager of*

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[9] Indeed, the maximum number of "130" franchise stickers to be given to any franchisee, was derived from the fact that duopoly company Yellow Cab already had 130 permits (counting its so-called "temporary" permits), and the minimum "50" number doubtless came from the fact that the other duopoly company, A Taxi Cab, had 50 permits [AR2, 362].

[10] While The City denies that any such advantage was ultimately given, the point is that this was the standard as of the time of the RFP application deadline, and upon which Petitioner relied.

This underscores the lack of fundamental fairness to Petitioner caused by the timing anomaly. Had the RFP been circulated (or re-circulated) *after* Petitioner had already won its 117 permits in Court, then it would have perceived that it would automatically receive the benefit of this "grandfather advantage" and would have submitted a franchise bid.

duopoly company A Taxi Cab.[11] This denial of equal treatment *had to have affected* Petitioner's decision not to apply for a franchise because of futility, especially in light of the long history of The City's denials and unfair treatment to Petitioner.

(c) Other due process violations

Petitioner was also deprived of due process by lack of notice of a "phase-in" period for many franchise requirements, which issue became a major point of contention, Petitioner noting that the RFP [AR2, 858-870] did **NOT** allow any phase-in *except* that the franchisees were allowed a *two-month phase-in for the first 30% of the allocated vehicles*, and *all* allocated vehicles had to be placed in service within 6 months [AR2, 864]; it specifically did *not* allow a "phase-in" for compliance with any of the other criteria *bid* by the applicants, *including the use of a computerized dispatch system, which was required from day one* [AR2, 865]; Petitioner thus understood that it had to have *already* complied with the minimum criteria just in order to submit a responsive bid. It is respectfully submitted that the contrary conclusion of fact adopted by the court of appeal, that *Petitioner only believed it would have to pay about $300,000.00 to upgrade its fleet and*

[11] The City's acts in repeatedly continuing the Council hearings to "wait for" American Taxi, shows how entirely legitimate, that belief was. As noted in a detailed chart and timetable [CT3, 326 & 354], The City delayed for **eight months** waiting for that company, floundering in a Chapter 11 proceeding, to somehow "snatch victory from the jaws of defeat" and not lose its fleet through repossession (as ultimately happened). This was a clear violation of AMC 4.73.070.010 (App. 79), which imposed a 60-day limitation.

operations if it WERE AWARDED a franchise, not simply to make a truthful application for the same (*see* Opinion in case #G030551, App. 15 & 17) was not supported by the evidence. Instead, consistently, Petitioner's words and actions supported its tenet that the franchise was promulgated in order to "legally" exclude South Coast Cab from Anaheim (*e.g.*, Mr. Roditis' remarks at the August 2000 Anaheim City Council meeting, that: " . . . my suggestion is, everything came up on those things, just for me. Because I applied eight times for business license, and they know I have to spend like three hundred thousand dollars to meet these requirements" [AR2, 287-288]; paragraph 14 of the Declaration of Irene Roditis in support of Petitioner's 5/28/02 Supersedeas Petition.) It should also be noted that Petitioner's disinclination to interpolate an unwritten "phase-in" on an Anaheim ordinance was justified based upon its own unhappy experience requesting a "phase-in" on a taxicab permit application [AR2, 85].

IV. Evidence of ongoing antitrust activity on the part of Anaheim in the form of successive alterations to its Municipal Code tracking Petitioner's taxicab applications supports Petitioner's futility argument and excuses its "failure to pursue administrative remedies."

Although no law seems to specifically so state, the cases infer that "futility" has to be judged on a "subjective" rather than "objective" basis; the futility analysis is fact-specific (*see, e.g.*, *Economic Empowerment Found. v. Quackenbush* (1997), 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323 (*dicta*)). Also, the great weight of authority excuses the failure to pursue an administrative remedy based upon "unusual circumstances" (*see*, *e.g.*, *Board of Police*

Commissioners v. Superior Court (*supra* at 432); *Yamaha Motor Corp. v. Superior Court* (1986), 185 Cal.App.3d 1232, 1241, 230 Cal.Rptr. 382 (*dicta*).)

Further, *vagueness challenges necessarily entail a subjective analysis*; the standard is that a statute is voidable for vagueness where it cannot be ascertained what action must be taken in order to comply with its terms (*Grayned v. City of Rockford* (*supra* at page 108)). *The Court of Appeal in case #G026197 specifically acknowledged that "the vagueness doctrine is highly contextual and fact-specific*, noting that the doctrine "cannot be 'mechanically applied'" (*citing from Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1981) (App. 33)). Here, then, *the analysis has to be as to Petitioner*, the party trying to figure out what action has to be taken in order to comply with the statute's terms (rather than The City, or even Real Parties in Interest). **It cannot be the case that the statute can only be void for vagueness if the one drafting the ordinance, is the one that is confused by its vagueness**; this would necessarily mean that no statute would ever be declared unconstitutionally vague!

One has only to look at the progression of the changes to the taxicab licensing provisions of the Anaheim Municipal Code to get a clear picture of The City's antitrust activity in its efforts to meet Petitioner's ongoing challenges while effectively barring Petitioner from entry into Anaheim. The most relevant of these ordinances are contained at App. 61-82. Before Petitioner formally applied for an Anaheim taxicab permit in April 1997, **the city ordinances** governing taxicab operations, in pertinent part Anaheim Municipal Code ("AMC") sections 4.72.020, -.030, -.040, and -.200 (App. 62-66) **had been the same *since***

1981, and provided *clearly disparate treatment* – that "new" applicants had to run the gauntlet to meet detailed criteria and to establish the impossible "need or necessity" standard *for every single permit* (AMC 4.72.040), while *existing operators merely asked the Chief of Police and Mr. Poole* for more permits in an informal, non-public procedure (AMC 4.72.200). After Petitioner's consultant Jack Armstrong whispered to City Manager James Ruth that this might cause The City to lose its "antitrust exemption," Anaheim suddenly amended its AMC in February 1998 to add or amend AMC sections 4.72.010, -.020, -.030, -.040 (App. 66-71),[12] to now require the existing permit holders to *also* go before the Council to seek additional permits, but still the standards were different – while new applicants had to try to pin down the same nebulous need or necessity "criteria" (AMC section 4.72.040.0102) (App. 71), existing permittees only had to show that the "additional vehicles are necessary in order *for the permit holder* to adequately service the entire city" (AMC 4.72.080) (emphasis added) (App. 72), a subjective and quite lower standard.

Then after Petitioner complained that there was no way to tell which of licensee A Taxi Cab's 250 taxicabs were the 50 ones authorized to pick up Anaheim fares, and which were not (since arguably all 250 were being used, and this "skewed" the "need or necessity" survey results), The City enacted AMC 4.72.045 in *October* 1998 (App. 71-72) to require that taxicab decals be affixed to the "legal" vehicles. When all of these manipulations resulted in

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[12] These included the City's newly-adopted OCTAP regulations.

Anaheim being short of taxicabs, because "bandit cab activity" (unlicensed pick ups) had decreased and the "need or necessity" for more cabs became more pronounced, *rather than simply giving Petitioner the permits for which it had been granted "first-in-line" status in February 1998*, The City engaged in more administrative gymnastics and instead awarded "temporary permits" to the duopoly operators, and then initiated the franchise (*see, e.g.,* AMC 4.73.040, 0.045, -.050, -.070, -.210, which included a provision just "custom-made" for Petitioner (4.73.210) to "sunset" its 117 permits, **all drafted AFTER Petitioner had won its permits by judicial edict in case #G026197 and well after it was too late to submit an RFP bid** (App. 74-82).)

It is submitted that *these facts and chronology explain the reasonableness of Petitioner's failure to submit an RFP bid.* As the Petition for Rehearing, etc. noted, the 4/17/03 Opinion improperly began its analysis *starting from 9/20/00 when the RFPs were sent out*, prior to the filing of the Opinion in case #G026197 awarding Petitioner its Anaheim taxicab permits, thus incorrectly determining that the denial of injunctive relief was proper because Petitioner had "pinned its entire hopes on" not having to comply with the franchise (Opinion in #G030551, App. 13). No; Petitioner truly believed that under no conceivable circumstance would Anaheim ever award it a franchise; that the entire Anaheim franchise concept was specially promulgated to "legally" exclude it [CT3, 291-294]. "Where the administrative agency has made it clear what its ruling would be, idle pursuit of further administrative remedies is not required by the exhaustion doctrine." *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976), 58 Cal.App.3d 492, 129 Cal.Rptr. 893 (citations omitted).

Petitioner relied in large part on *Ogo v. City of Torrance* (1974), 37 Cal.App.3d 830, 112 Cal.Rptr. 761 for the premise that a party is excused from seeking relief from a City Council where that same council changed the operative Municipal Code in an effort to thwart the permit-seeker's application.[13] The instant case is procedurally matched with *Ogo*, as not only was it the unusual circumstances of the case that gave rise to relief, but that the circumstances of the case "birthed" Anaheim's ordinance.[14]

This brings the constitutional analysis "full circle." The RFP and ordinance *enacted by Anaheim acting in a legislative capacity are subject to constitutional challenge without any exhaustion of administrative remedies.* It is important to note, as the court of appeal seemed to overlook, that (1) the RFP and even the franchise ordinance *never* committed to offering a total of "three franchises," but merely "up to three," which could have been two (or

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[13] In *Ogo,* the Torrance City Council, getting wind that Ogo was about to apply for a permit, enacted a municipal zoning ordinance which would make Ogo's project impossible. When Ogo sued, Torrance objected that (just as The City has done in this case) Ogo had "failed to exhaust its administrative remedies" because he had not first applied to the City Council for a variance.

[14] The court of appeal in case #G030551 did not agree, literally relegating the *Ogo* case to a footnote (#5, App. 12):

> Hence South Coast Cab's request for an injunction is not really about the effect of the doctrine of exhaustion of administrative remedies (e.g. *Ogo v. City of Torrance* (1974), 37 Cal.App.3d 380 (party who sought to build low income apartments was not required to apply for a zoning variance in order to attach zoning of property)). It is about whether South Coast Cab could attack an ordinance which forced *companies operating in Anaheim* to first compete for one of three franchises (emphasis added).

even one (1)) [AR2, 858], a probable perpetuation of the taxicab "duopoly;" and (2) the anomalous chronology of events resulted in unfairness *at least as applied to Petitioner: Petitioner was not "operating in Anaheim"* during the RFP period so *it was not in the position to even consider* whether it should be "forced to compete"!

In addition to the evidence of Anaheim's reactionary changes to the AMC, the factual history supports a good faith conclusion of futility. The analysis cannot fairly be viewed in "20-20 hindsight," based upon what transpired *after 10/30/00*, but should instead take into consideration evidence that the favored "fair-haired child" American Taxi was formed in June 1999 *in conjunction with* Anaheim's conception of the franchise, and that the franchise was written "around" American Taxi's vehicles, dispatch system and experience qualifications [AR2, 679, 680]; Staff Officer LaRochelle's assurance in 1991 that Petitioner would "never operate in this City" [CT3, 43]; that years later, Petitioner was turned down **every single time it applied, despite having REPEATEDLY jumped through all of The City's "hoops"** [CT1, 789-791]; done the expensive Armstrong "need or necessity" survey [CT1, 217-329]; increased its fleet size [CT1, 142-286 and 474]; offered to operate in Anaheim *only* "outside of the resort area" for a full year [CT1, 590-593]; and expressed willingness to operate on a "temporary" basis [AR2, 307-311]. Such consideration would include **A Taxi Cab's** General Manager's July 1998 **admission that he had withdrawn that company's request for more cab permits only *because Staff told him to do so***, because his request was "only adding fuel to the fire" of those trying to come into the City (referring to

Petitioner) [CT1, 1285; AR1, 527], and Petitioner's knowledge that the person considering its franchise application, would be the same one **who had announced with a straight face that when an application for taxicab permits came in from a "new" company, he routinely called up the two existing license holders to ask them whether they want to put in a request for more cabs for *their* fleet, "to keep out competition," and that he "sees no problem with that"** [Reporter's Transcript from appellate case #G026197 ("[RT1]"), page 46 & 78; CT1, 771], revealing the conspiracy to keep South Coast Cab out of Anaheim, for what it was. Such review would consider that Petitioner was perpetually called upon to prove a "need or necessity" that (as noted in case #G026197) no one could define, and which was selectively judged by Staff [AR2, 70 & 71].[15]

Evidence of post-RFP events are also probative to reveal the franchise's pretextual nature. Incumbent A Taxi Cab indisputably submitted a non-compliant, incomplete RFP application, failing to furnish audited financial statements [AR2, 3017], an absolute requirement for consideration [AR2, 867 & 860]. The application was

[15] Even in hindsight, common sense compels the conclusion that Petitioner's belief that making a franchise application would just be one more "idle pursuit" was wholehearted; why else would a company that had already spent three-and-a-half years of time attending countless City Council and court proceedings, and which had already expended a huge amount of energy and large sums of attorney's fees, fail to submit an application, if it believed that it had a chance?

supposed to be "returned unopened;" yet A Taxi Cab's application was considered and a franchise awarded![16]

And while The City's proffered facially "legitimate goal" justifying the elimination of competition was to "raise the Bar" of taxicab service in Anaheim,[17] and The City Council, Staff and the City's Consultant all pointed *ad nauseum* to the *use of a computerized dispatch system as the single most important attribute of the franchise* for this purpose (*see, e.g.*, AR1, 1651; AR2 336, 338 & 3025), enabling The City to track response times [AR2, 218]; a full page of the otherwise short RFP, was devoted to it [AR2, 865]), and the Consultant *recommended* Cabco for the award of a franchise, *because* it would use "automated dispatch" – (Schaller 3/27/01 Report [AR2, 562]),[18] The City **could not** track response times of the only "new" Anaheim taxicab operator because in the end The City *totally ignored the computerized dispatch requirement* and gave

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[16] Non-elected Anaheim employee Poole justified this departure from Anaheim law requiring audited financials [AR2, 485] by explaining that he had changed his mind, *after the RFP application period had expired!* [AR2, 363] stating that: "We did not feel that it was appropriate to outright reject them because we were able to get information from the certified audits that we felt was sufficient" [AR2, 490]. This despite plenty of documentary evidence that A Taxi Cab was having financial difficulty and often did not pay its bills [AR2, 3029-3031 & 3039-3073].

[17] The Record is saturated with references to the goal of the franchise to "raise the bar" of taxicab service in Anaheim (*e.g.* (but without limitation), [AR1, 1170 and AR2, 338, 483, 555, 3008, 3152].)

[18] Within that same Report, Mr. Schaller also recommended the award of a franchise to Cabco because it was to operate a fleet of CNG taxicabs that were ULEV-certified (only using 30 gasoline-powered vehicles as a back-up) [AR2, 699], but Cabco also did not do this.

Cabco a franchise anyway![19] Thus any presumption that the franchise might have actually had a legitimate purpose, has been completely dispelled.

On the basis of the above, it is respectfully requested that this Honorable Court grant this Petition for Writ of Certiorari.

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[19] In related case #G030551, this Honorable Court granted judicial notice of subsequent Trial Court proceedings, including the record of the SCC's 5/28/03 Petition for Writ of Supersedeas, etc. (by Order filed June 18, 2002) and the Motion submitted by Respondent Anaheim on December 23, 2002 (by Order filed January 8, 2003), thus including evidence of the trial court proceedings *all the way through at least November 2002*. While it has been operating "under the franchise" since 2/17/02, Cabco admitted that it ***still** has not purchased the system* in its Respondent's Brief in case #G030551, page 5).

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SOUTH COAST CAB CO., INC., Plaintiff and Appellant, v. CITY OF ANAHEIM et al., Defendants and Respondents.	G030551 (Super. Ct. No. 800359) OPINION (Filed April 17, 2003)

Appeal from an order of the Superior Court of Orange County. David H. Brickner, Judge. Affirmed.

Cazzell & Associates and Maryann Cazzell for Plaintiff and Appellant.

Jack L. White, City Attorney, and Moses W. Johnson IV, Deputy City Attorney, for Defendants and Respondents City of Anaheim, Richard LaRochelle and John Poole.

Farano and Kieviet and Jeffrey L. Farano for Defendant and Respondent Cabco Yellow, Inc.

Astor & Phillips, John Kelly Astor and George R. Phillips, Jr. for Defendant and Respondent Yellow Cab of North Orange County.*

* * *

I. INTRODUCTION

This is an appeal from the denial of a preliminary injunction (see Code Civ. Proc., § 904.1, subd. (a)(6)). South Coast Cab, holder of some 117 permits to operate taxicabs in Anaheim, sought to prevent the elimination of all but 30 of those permits pursuant to the city's change from a permit system to a franchise system but the trial court denied its request.

We conclude that the trial court did not abuse its discretion in denying the preliminary injunction. South Coast Cab's likelihood of prevailing on the merits is small indeed, because of the absence of a sound legal basis to either strike down the franchise ordinance or exempt South Coast Cab from its operation.

South Coast Cab cannot find refuge in our prior opinion, *South Coast Cab Co., Inc. v. The City of Anaheim* (Dec. 19, 2000, G026197) [nonpub. opn.], which resulted in its obtaining the 117 permits in the first place. Our opinion did *not* exempt or insulate South Coast Cab from a change to a franchise system. It only said that South Coast Cab was entitled to have been given the permits it applied for when a permit system was in effect.

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* Cabco Yellow, Inc. and Yellow Cab of North Orange County were made parties to the case in a second supplement to the third amended complaint filed after the order which is the subject of this appeal.

Nor can South Coast Cab make a case based on discriminatory treatment. An examination of the administrative record bearing on the city's decision to change from a permit to a franchise system shows substantial evidence that the change was not motivated out of spite against South Coast Cab. The city began the process of changing over before this court began work on the opinion that ultimately resulted in South Coast Cab obtaining its 117 permits.

II. FACTS

The changeover from a permit to a franchise system began no later than in March 2000. At a city council meeting held March 21, 2000, John Poole, the city's code enforcement manager, said that after many hours of study his department favored a franchise system because it delivered better service.[1] Poole pushed for the city to hire a consultant to put together a franchise system. The city agreed to spend about $78,000 to hire a consulting firm to develop a proposed franchise system. At that point the city had denied South Coast Cab the permits it had applied for in May 1999 and South Coast Cab had already lost an attempt in the trial court to force the city to give it those permits.

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[1] The theory is that the applicants for the franchises would compete against each other to propose the best possible terms of service to the public. Also *policing* service is easier for city officials under a franchise system. However, a franchise system still leaves control over the number of taxis in service to the government and not the marketplace.

The consultant delivered his report to the city in July 2000. This court had not even sent out notices for oral argument in the previous appeal yet, though South Coast Cab had successfully applied for calendar preference. The consultant's report, ironically enough, noted that the "public convenience and necessity" standard used in the city's permit system was a "difficult standard to apply."[2] By contrast, according to the consultant, a franchise system offered "clear criteria" and the advantage of easier accountability.

The consultant proposed that the franchise system consist of a total of 230 taxicab permits allocated among three franchisees. He recommended that there be various minimum requirements and service standards which they would have to meet. The priciest involved new equipment. No taxicab could be more than seven model years old, no taxicab could have been in service as a taxi for more than five years, and franchisees would have to keep two wheelchair-accessible vehicles in their fleets. A computerized dispatch system would also be required.

As the consultant envisioned the system, the city would send out "requests for proposal" to various taxicab companies, who would send back proposals accompanied by a $3,000 non-refundable fee plus a $10,000 refundable deposit (refundable in the event the applicant wasn't awarded the franchise).

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[2] Indeed, it was precisely the vagueness of the standard which led to that part of the ordinance being struck down as unconstitutional in our prior opinion.

At a city council meeting held August 29, 2000, the city adopted the franchise "components and criteria" proposed by the consultant wholesale, and directed its staff to circulate requests for proposals.

On September 20, 2000 – about the same time as oral argument in the previous appeal was being held – the city circulated its requests for proposal. Those requests stated that franchises would be awarded "up to three proposers who best" met the requirements specified in the request. That language suggests that the city would allow some leeway for proposers who didn't meet the requirements (as long as they were among the three "best"). On the other hand, the proposal requirements included a statement that "[n]o proposal will be considered . . . which is incomplete," with any "such late or incomplete proposal [to] be returned to the proposer unopened," which suggests that the city might have a priori rejected any proposal that was incomplete, even if it did "best" meet the franchise requirements. The franchise requirements included the provision of "audited balance sheet, cash flow and income statements in the forms as described by generally accepted accounting principals [*sic*]." The deadline for submission was October 20, 2000.

Five companies submitted proposals for the three franchises: Yellow Cab of North Orange County, A Taxi, American Taxi, Cabco Yellow, and AM-PM Taxi. South Coast Cab chose – we will explore in more detail the reason below – not to submit a proposal. Meanwhile, this court had heard oral argument on South Coast Cab's appeal from the denial of its petition for a writ of mandate to require the city to give it permits under the old permit system, and was in the process of preparing its opinion.

The requests also set forth an anticipated time table for implementation of the franchise system: Requests would be sent out in September 2000, be returned a month later in October, evaluated in November and December, and awarded pursuant to ordinances adopted in late December, so that the franchise period (of five years, with a renewal for another five) could begin in mid-January 2001.

Talk about overoptimism. The franchise proposals received in October were not finally evaluated and turned into franchises until December 2001. What happened? Well, our opinion in the prior appeal, filed in December 2000, no doubt created a need for further study and evaluation by the city attorney's office – we had, after all, just told the city that its old permit system was unconstitutional to the extent that it allowed the "hopelessly procrustean" necessity standard to be used to exclude competitors from the local taxi market.

Our decision was not final until the Supreme Court denied the city's petition for review in March 2001, and by April 2001 the city council had a report from the franchise selection committee ranking, based on a 0-100 scoring system, the five companies who had submitted proposals. Yellow Cab of North Orange County came in first, with a score of 93. Then came American Taxi (77.75), A Taxi (73.5), Cabco Yellow (70.75) and AM-PM (44.5). The committee recommended that 130 permits go to Yellow Cab of North Orange County, 50 go to American, and 50 go to A Taxi. The committee recommended granting franchises to the top three (Yellow Cab of North Orange County, American, and A Taxi), and denying franchises to the others. American, however, had just filed for bankruptcy, so most

of the next eight months were taken up with continuances and delays waiting to see what would happen.

During the Spring of 2001 – that is, at about the point at which the committee was evaluating the proposals and making its recommendations – the trial court entered an order requiring the city to grant South Coast Cab the 117 permits at issue in our previous opinion. Also in that opinion, as a housekeeping measure, we had suggested that South Coast Cab file a third amended complaint listing its surviving causes of action. (The point is, the trial judge shouldn't have to shift between unwieldy files to figure out exactly what was in the pleadings.) That third amended complaint was filed in July 2001.

On the franchise front, the uncertain status of American's application was finally resolved in mid-December 2001, when American withdrew its proposal and the city accepted the withdrawal, allowing American to recover its $10,000 deposit. That left Yellow Cab of North Orange County, A Taxi, and Cabco Yellow as the winners, and they were awarded franchises in mid-January 2002. The franchise ordinance contained a grandfather provision allowing companies with existing permits to keep up to 30 of them for five years, which in practice meant that South Coast Cab was to have its taxi permits reduced from 117 to 30, effective May 31, 2002. (This court later stayed implementation of that aspect of the ordinance pending this appeal.)

South Coast Cab then filed its motion for a preliminary injunction, heard in March 2002. Much of the colloquy between South Coast Cab's counsel and the trial judge revolved around the precise legal theory advanced by South Coast Cab. Ultimately the trial court decided that it

would not use its equitable powers to "dismantle the franchise system at the behest of a party who never even sought issuance of a franchise to it" and further reasoned that an injunction would "affect the important and substantial rights of entities not parties to this action," i.e., the franchise winners.

South Coast Cab then filed this appeal from the denial. Because that order is the only appealable order or judgment at issue in this proceeding, it is all we address here.[3]

III. Discussion

In general, there are two main factors courts use to determine whether to grant a preliminary injunction: likelihood of success on the merits and balance of hardships. (E.g., *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) Because the trial court's ruling on a preliminary injunction does not decide the ultimate merits of a controversy, the court's decision is tested under an abuse of discretion standard. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) In this case we conclude that the likelihood of success on the merits was so low – essentially the likelihood is nil – that the trial court clearly did not abuse its discretion in denying the preliminary injunction.

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[3] In a separate proceeding (G030079), we address a final judgment obtained in favor of the two code enforcement officers, Richard LaRochelle and John Poole.

A. The Effects of Our Prior Opinion

Much of South Coast Cab's paperwork at both the trial and appellate levels has been centered on the proposition that the city could not, consistent with our prior opinion, enact a franchise ordinance which would have the effect of eliminating the permits that South Coast Cab won in that opinion. The argument fails because the adoption of a franchise system is not inconsistent with our previous opinion.

That opinion covered two subjects: First, was the trial court correct to assume that South Coast Cab had no causes of action *other than* a request for administrative mandate to make the city give it the permits it had applied for in April 1999? The answer was no; we showed that South Coast Cab's Unruh Act and antitrust causes of action were based on alleged disparities of treatment independent of South Coast Cab's application. It was the very fact that South Coast Cab, as a newcomer to the Anaheim taxi market, had to apply for permits in the first place, while the existing permittees did not, that formed the basis for its causes of action. (*South Coast Cab Co., Inc. v. The City of Anaheim, supra,* G026197 at pp. 6-10.)

The second question was whether the trial court correctly denied South Coast Cab's administrative mandate action, and on that point South Coast Cab also prevailed. Under Anaheim's permit ordinance, a taxicab operator had the right to obtain a permit if it met certain objective requirements *and* showed that "public convenience and necessity" were served by granting the permit. When South Coast Cab applied for 117 permits in April 1999, it met the objective requirements, but couldn't meet the "necessity" requirement, which was the way the city

was able to arbitrarily control the number of operating taxicabs. We held that the necessity requirement was void for vagueness (*South Coast Cab Co., Inc. v. The City of Anaheim, supra,* G026197 at p. 14) because it was manipulable at the point of enforcement. If, for example, city officials didn't want any newcomers competing in the taxi business, all they had to do was find no "need" for more taxis in the city.[4]

South Coast Cab was *otherwise* entitled to the permits it had applied for in April 1999. Once it had been determined that the only impediment to those permits was an unconstitutionally void provision, South Coast Cab's

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[4] One of the issues before the court in the prior opinion was the question of whether the city's finding was supported by substantial evidence. Because we determined that the ordinance was void for vagueness, we did not have to reach that issue. However, it should be noted that there was plenty of evidence of very poor service in the record. Here is what the evidence relied on by the staff in recommending the denial of South Coast Cab's permits showed:

– 33 percent of Anaheim businesses said "[t]here are usually not enough taxicabs" in Anaheim, and another 12 percent said that there are "usually enough" taxicabs *except* during conventions. Only *three percent* said that there are usually "more than enough" taxicabs in the city.

– A "majority" of Anaheim businesses reported that actual taxicab response time in the city was longer than what they preferred.

– A third of those surveyed said that between 10 to 25 percent of the time a taxicab was not available within "the desired response time."

And those were the results of a survey the staff had relied on. A private survey of Anaheim businesses conducted in 1997 revealed that *100 percent* of respondents in the Anaheim Stadium and Anaheim Hills area thought "that adequate service is not always available." Eighty-three percent of businesses responding in the private survey answered that there were "times when cab service is slow or not available when [their] customers need[ed] it."

entitlement to the permits it had applied for became obvious.

Our decision, however, said nothing about the city's right to change to a franchise system, in which case the permits of all competitors might be reduced. One cannot extract from the opinion, as South Coast Cab has tended to do throughout these proceedings, an entitlement to permits sufficient to withstand an otherwise legitimate change from a permit system to a franchise system. The "spirit" of the opinion – a theme to which South Coast Cab often returns – was that South Coast Cab should have been given the permits it applied for when it applied for them, not that those permits were forever immune to some revision of the city's taxicab permit laws.

O'Connor v. Superior Court (1979) 90 Cal.App.3d 107 [city could compel existing taxicab permits holders to surrender old, transferable permits for new, nontransferable ones] is on point. If a city has the right to change from a transferable permit system as in *O'Connor* – that is, from a system where the permits have an artificially created market value – to a system of nontransferable permits (thereby depriving the permit holder of a real tangible economic interest), it has the right, as here, to change from a nontransferable permit system to a franchise system. We need only contemplate that the change from a permit system to a franchise system, at least in theory, could have resulted in the loss of the permits held by the two *existing* permit holders (Yellow Cab of North Orange County and A Taxi) while South Coast Cab could have increased its permits (from 117 to 130).

B. The Motivation Behind the Changeover

So the question then becomes whether the changeover was not "otherwise legitimate" because it was instituted, as South Coast Cab asserts, to spitefully deprive it of the hard won fruits of its prior win. While South Coast Cab never articulated a legal basis to support the assertion other than "law of the case," i.e., the legal effect of our prior opinion, we may assume for the moment that it could find support somewhere in the basic law of antidiscrimination and be supported by some reference to constitutional equal protection or civil rights law.[5]

This argument fails because of the basic sequence of events. South Coast Cab had already lost in the trial court when, in March 2000, the city authorized some $80,000 to get a consultant's report about changing to a franchise system. Any permits that might have been obtained *then* were not even a glint in the judicial eye.

It is true that the outcome of the appeal, and the subsequent issuing of the permits pursuant to it, largely coincided with the various stages of the city's change from a permit system to a franchise system. But the overlap is, strictly speaking, irrelevant. There is no *necessary* connection between South Coast Cab's obtaining permits it was

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[5] Hence South Coast Cab's request for an injunction is not really about the effect of the doctrine of exhaustion of administrative remedies (e.g., *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830 (party who sought to build low income apartments was not required to apply for a zoning variance in order to attack zoning of property)). It is about whether South Coast Cab could attack an ordinance which forced companies operating in Anaheim to first compete for one of three franchises.

entitled to under the old system, and a decision to have a franchise system.

At root, South Coast Cab's position is a conspiracy theory, predicated on the notion that the city's code enforcement officers, LaRochelle and Poole, are biased against the firm and its owners and determined not to let it operate in Anaheim, and went so far as to foist a franchise system on the city council for that very purpose. But the record is remarkably free of anything that shows any animus toward South Coast Cab.[6] In fact, in August 2000 – before South Coast Cab had won anything in this court – council member Feldhaus specifically invited South Coast Cab to apply for a franchise.

However, because of the ethnic smoking gun in the form of the allegation in the complaint that LaRochelle was determined not to let South Coast Cab operate in the city because he didn't like Greek taxicab companies, we have examined the record very critically to determine whether the franchise system was subtly structured in such a way as to deter South Coast Cab from applying for a franchise.

Did the city make it difficult for South Coast Cab to even *apply* for a franchise? No. The nonrefundable fee was

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[6] There is only the allegation, and that found in the complaint, not the administrative record, that LaRochelle told South Coast Cab's owner in 1991 that he should "just go back to Greece." The comment might support some sort of civil rights cause of action based on a failure to receive permits under the old system, but it cannot, without more, support equitable relief to prevent the implementation of a franchise system itself.

$3,000, which South Coast Cab does not claim was prohibitively expensive; the $10,000 was refundable.

Next, what about the general "hassle" of applying? It might be compared to the onerousness of preparing one's own tax returns. The city's requests for franchise proposals set forth a series of fairly stringent paperwork requirements, requiring a variety of specifications as to what South Coast Cab intended to do, and how it intended to meet the franchise requirements. But again, South Coast Cab has not pointed to any inherent difficulty in paperwork preparation (and judging by this record, South Coast Cab is certainly capable of producing a great deal of paper in its efforts to remain in the city).

The best South Coast Cab can do in the regard to any arbitrary barriers to merely applying is note a disparity with one of the companies that eventually did obtain a franchise, A Taxi. A Taxi did not comply with the city's stated requirements for "audited" financial statements.[7] If the expense of obtaining such statements deterred South

[7] Two other companies have also been alleged to have been the beneficiaries of favoritism, but the case as regards them is so weak that it can be relegated to this footnote. First, the city council *did* wait on American before it made its ultimate franchise decision. But, as the city points out now, the delay was prudent in light of the bankruptcy law which requires cities not to discriminate against franchise applicants because they file for bankruptcy. (11 U.S.C. § 525(a).) (South Coast Cab also forgets that the delay occasioned by American's bankruptcy ultimately inured to its benefit, if only because it delayed implementation of the franchise ordinance reducing its 117 permits to 30.) The second allegation of favoritism concerns Cabco, which supposedly didn't immediately meet all the terms of its bid when it started operating. That point is refuted because the franchise ordinance itself gave each successful applicant two months to comply.

Coast Cab from applying, and if the city was willing to excuse A Taxi's lack of compliance, then it might be inferred that the city had not played fair: A trier of fact might find that A Taxi had been given a wink and nudge from the city code enforcement people indicating that, despite the comment in the city's request for proposal that "[n]o proposal will be considered . . . which is incomplete," it wouldn't be required to submit audited financials, while at the same time the officials told South Coast Cab that strict compliance would be demanded from it. Thus the city would have discriminated against South Coast Cab in favor of A Taxi by indirection.

But that theory doesn't work, because of statements made by both of South Coast Cab owners, Savvas Roditis and his wife Irene Roditis, which indicate that any expense or "paperwork cost" of merely *applying* for a franchise was not the reason South Coast Cab did not apply. In traditional tort terms, there was no *causation* between the city's requirement for audited financial statements and the decision by the owners of South Coast Cab not to apply for a franchise.

Specifically, at a city council meeting in August 2000, Savvas Roditis indicated that he did not want to spend $300,000 to "meet these requirements." He was obviously referring to what South Coast Cab would be required to spend *if it first received a franchise.* The "transaction" or "paperwork" cost of applying was only $3,000 plus the hard-to-quantify costs of preparing the application itself. And Irene Roditis, in her deposition, made the point that South Coast Cab would not be awarded a franchise in the first place because it couldn't compete with American, which had a new fleet of natural gas powered taxis. (Ironically, American went into bankruptcy, and ultimately

withdrew its application.) In sum, both Savvas and Irene Roditis pointed to either the expense of meeting the franchise requirements if one were obtained, or the futility of applying, as the reasons South Coast Cab didn't apply. They never mentioned anything in regard to the difficulty of applying by itself.

That leaves the actual cost of complying with the franchise requirements if one were awarded, as alluded to by Savvas Roditis' statement about not wanting to spend $300,000. Most of those requirements, however, easily pass a reasonable basis test, particularly in light of Anaheim's resort area. The city certainly doesn't want to lose business to Disney World in Florida because Anaheim has a reputation for bad taxi service (i.e., slow response times, old or dirty cars).[8]

South Coast Cab's best case for discriminatory treatment in terms of the operation of the franchise ordinance itself (as distinct from the process of applying for a franchise) is to be found in the system for evaluating franchise proposals. Twenty-five of a possible 100 points were graded on the basis of prior taxi experience, with one part bearing on prior *Anaheim* experience. That aspect of the evaluation suggests possible subtle discrimination against market newcomers. The two companies already operating in the city, Yellow Cab of North Orange County and A Taxi,

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[8] Apparently the requirement for a 24-hour computerized dispatch system is not something that most cab companies already have, but South Coast Cab has not made the argument that the requirement is inherently excessive, and in any event it applies to everybody awarded a franchise.

would get a leg up for having been part of what South Coast Cab calls the previous "duopoly" system.

But this argument also fails for lack of causation, i.e., South Coast Cab never sought to obtain a franchise in the first place, even if the scoring were weighted evenly. Nor did South Coast Cab even request in the trial court that the franchise system be revised so as to prevent existing operators from having an unfair advantage in the evaluation.[9] And in fact, the city's weighting in favor of existing operators can hardly be said to be unreasonable on its face. Experience in a city *is* a genuine plus in the taxi business, where consumers, all else being equal, prefer drivers who are familiar with the layout of a city and who will know the shortest route to their destination.

If South Coast Cab were prepared to compete for a franchise, and simply wanted a level playing field, presumably it would have requested relief in the trial court seeking a mere modification of the evaluation criteria for the franchise system, not its wholesale overthrow. The fact that it didn't make such a request confirms what can be reasonably inferred from Savvas Roditis $300,000 remark: South Coast Cab didn't want to be part of *any* franchise system, and had pinned its entire hopes on being exempt from one.

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[9] For example, why not allow proposers who weren't already operating in Anaheim to make up for the absence of prior experience by taking a test in Anaheim geography or by equipping their cars with those computerized devices that tell you (presumably) the fastest way to a given location from a given location.

IV. CONCLUSION

The order denying the preliminary injunction is accordingly affirmed. Because of that determination we must also dissolve the stay of the city's franchise ordinance to the effect that it prevented enforcement of the reduction in South Coast Cab's permits, albeit the dissolution of the stay is to be effective only upon the ultimate finality of *this* decision. In the interests of justice all sides will bear their own costs on appeal.

SILLS, P.J.

WE CONCUR:

RYLAARSDAM, J.

O'LEARY, J.

EXHIBIT A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SOUTH COAST CAB CO., INC., Plaintiff and Appellant, v. THE CITY OF ANAHEIM et al., Defendants and Respondents.	G026197 (Super. Ct. No. 800359) OPINION (Filed Dec. 19, 2000)

Appeal from a judgment of the Superior Court of Orange County. David H. Brickner, Judge. Reversed with directions.

Cazzell & Associates and Maryann Cazzell for Plaintiff and Appellant.

Jack L. White, City Attorney, and Moses W. Johnson IV, Deputy City Attorney, for Defendants and Respondents.

* * *

INTRODUCTION

When Savvas Roditis, owner of South Coast Cab Company, first inquired in 1991 about obtaining a permit to allow his taxi company to operate in Anaheim, one of the city's taxi code enforcement officers allegedly told him he "should just go back to Greece" and further stated that

if the officer had his way, Roditis would "never operate in this city." Years later, in 1999, while the same code enforcement officer was still working for the city, the Anaheim City Council voted 3 to 2 to deny Roditis' application to operate a fleet of taxicabs in the city, on the recommendation of a report from the code enforcement staff asserting there was no "necessity" for those cabs. We now reverse the trial court's judgment refusing to issue a writ of mandate to overturn the council's decision because, in the narrow context of this case, the Anaheim ordinance which predicates the right to operate a taxi within the city is unconstitutionally vague, allowing officials unfettered discretion to bar new entrants to the Anaheim taxi market.

Moreover, as we explain below, Roditis' civil rights claims made in his complaint in addition to his request for a writ of mandate should not have been the subject of a demurrer on the ground that administrative mandate was his "exclusive" remedy. Roditis' civil rights claims were not directed at the denial of the permit as such, but at preferential treatment afforded competitors who were not subject to the arbitrary "necessity" showing.

BACKGROUND

The hearing of the city council which was the focus of the trial court's denial of South Coast Cab's application for 117 taxicab permits took place in May 1999, but the story of this litigation begins in October 1998, when South Coast Cab filed a complaint against the city and two of its taxi code enforcement officials. The complaint alleged that in 1991, when Roditis first inquired of city code enforcement officers about obtaining city approval to operate taxicabs,

one of the officers "stated unequivocally to Mr. Roditis [ ] that he 'should just go back to Greece", and further stated words to the effect that 'if I [name of the code enforcement officer[1]] had my way, (Roditis/SCC) will never operate in this City."

The complaint then described South Coast Cab's April 1997 application for what would be, when the application was ultimately considered in July 1998, 100 taxi permits. Despite evidence of slow response times by a rival taxi company, and the fact that two thirds of that company's stops in Anaheim were being made by taxis *without* permits, the city counsel voted to deny South Coast Cab's application because "no need or necessity had been proven."[2]

The complaint further alleged that the two taxi companies already operating in the city (Yellow Cab and A Taxi Company) were being given preferential treatment, based on ethnic animus against Roditis by the code enforcement officers. Not only were the plaintiff's rivals not required to run the gauntlet of showing need before they obtained permits (the city practice was to allow them to obtain permits by simply asking the code enforcement

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[1] Because South Coast Cab's civil rights claims come to us on demurrer, we must assume they are true. Given that a trier of fact might yet disbelieve the allegation of ethnic bias in the complaint, it serves no good purpose to name the code enforcement officer here.

[2] The Anaheim Municipal Code states that the city shall issue a taxicab operator's permit if it finds that "The public convenience and necessity require the operation of the applicant's taxicab business in the City, and the applicant has a sufficient number of vehicles to adequately service the entire City." (Anaheim Municipal Code, § 4 72 040 0102.)

officers), but they were being allowed to operate taxis in the city that did not even have permits.[3]

Based on those core allegations, the complaint alleged causes of action for violation of the Unruh Civil Rights Act, violation of the company's rights to procedural and substantive due process, and violation of both state (the Cartwright Act, Bus. & Prof. Code, § 16600 et seq.) and federal (the Sherman Act, 15 U.S.C. § 1, et seq.) antitrust laws, based on the idea that the city had lost its "anti-trust exemption." The theory behind the antitrust causes of action was that the preferential treatment afforded the two rival taxicab companies meant the city was no longer acting in a public role.

A demurrer filed in November 1998 was sustained with leave to amend, Judge David R. Chaffee commenting that a petition for administrative mandate might be South Coast Cab's exclusive remedy. South Coast Cab then filed a first amended complaint in January 1999, adding a petition for administrative mandate (Code Civ. Proc., § 1094.5). The city demurred again. Prior to ruling on the demurrer, Judge Chaffee held an evaluation conference in which he again opined that South Coast Cab's exclusive remedy was in administrative mandate. In the wake of that comment, South Coast Cab dismissed all its causes of action without prejudice, except the one for administrative mandate.

The trial court once more sustained the demurrer with leave to amend, based on failure to allege "exhaustion

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[3] This practice had been discontinued by the time of the May 1999 hearing

and futility." In early April, South Coast Cab filed a second amended complaint, which was met, in mid-April, with yet another demurrer by the city.

In mid-June, the trial court again sustained the demurrer with leave to amend, which was immediately accomplished by allowing the filing of a supplemental complaint based on a *new* application for 117 taxicab permits made in April 1999. That application was denied by the city council on May 18, 1999. The supplemental complaint included an allegation that South Coast Cab had filed a request for rehearing of the May 1999 denial, and its request had been denied by the council in early June. Exhaustion and futility having been alleged, the court set a trial date for mid-July 1999, limiting the entire complaint to just the April 1999 application.

The case went to trial on July 20, 1999 before a new judge, David H. Brickner. Just before trial, South Coast Cab dismissed the individual code enforcement officers whom it had earlier named as defendants. The matter was submitted on September 22, and the court issued its ruling in early October, denying the petition. The court concluded, without elaboration, that the "operation of a taxi cab service" was not a "vested right" and therefore, under the substantial evidence test, the petition for a writ of mandate should be denied because the record "amply support[ed] the City Council's position." In just a few days South Coast Cab filed an appeal from the "ruling," though the ruling was reiterated in a formal judgment filed in December 1999 (making the appeal, such as it was, merely premature (see Cal. Rules of Court, rule 2(c)).

APPEALABILITY

The dismissal without prejudice of South Coast Cab's non-administrative mandate causes of action requires a small procedural detour. In *Don Jose's Restaurant, Inc v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115, this court held that the dismissal without prejudice of causes of action left unadjudicated after a summary adjudication was ineffective to create the one final judgment necessary for an appeal. There was a clear intention on the part of the plaintiffs to retain the dismissed causes of action for trial in the event of reversal of the judgment based on the summary adjudication. (See *id* at p. 118.) Accordingly, we dismissed the appeal. (*Id.* at p. 119.)

The present case is different, falling into a pattern which we distinguished from that in *Don Jose's Restaurant*. In the light of Judge Chaffee's comments that South Coast Cab's exclusive remedy was administrative mandate, it is clear that the dismissal without prejudice of South Coast Cab's other causes of action was the functional equivalent of the sustaining of a demurrer to those causes of action without leave to amend. South Coast Cab's counsel was simply sparing Judge Chaffee the task of making a ruling embodying his comments.[4]

Where there is no doubt as to "what the judgment would have provided" as to omitted causes of action, the defect "may therefore be cured by directing the judgment to be amended to reflect the rendition" of the judgment

[4] Probably not the "better practice," but certainly one that is understandable given the natural inclination of trial attorneys to try to stay on the good side of a judge

that the court would otherwise have been given. (See *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 308.) Here, the trial court might just as well have made an order sustaining the demurrers to the non-administrative mandate causes of action without leave to amend, and then incorporated that order into its December 1999 judgment. Thus this is a case, unlike *Don Jose's Restaurant*, where "the *substance* of what is going on is an appeal from a final disposition of all issues between two parties," albeit without "a formal piece of paper embodying that disposition." (See *Don Jose's Restaurant, supra*, 53 Cal.App.4th at p. 117, original italics, citing *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 740.)

We therefore now amend the judgment to reflect the manifest intent of the trial court. (See *Sullivan, supra*, 15 Cal.4th at p. 308; *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 289, fn. 1.) So amended, we have a final judgment covering all causes of action between the two parties, and we may proceed to the merits of the appeal.

EXCLUSIVITY OF ADMINISTRATIVE MANDATE?

The first question that naturally arises was whether the trial court was correct in ruling that South Coast Cab's "exclusive" remedy was in administrative mandate under section 1094.5 of the Code of Civil Procedure. The answer is, with the exception of the due process claims, no.

Preliminarily, we must distinguish between the traditional doctrine of exhaustion of *administrative* remedies from the doctrine of the "exclusivity" of the *judicial* remedy of administrative mandate. That distinction is aptly illustrated in *Knickerbocker v. City of Stockton*

(1988) 199 Cal.App.3d 235. There, the appellate court held that *some* of the causes of action for damages brought by a police officer against a city were barred because he failed to seek administrative mandate challenging the result of a civil service commission hearing, but some were not.

In *Knickerbocker*, a police officer was first fired, then he challenged his firing in proceedings before the civil service commission. The commission found that there were proper grounds for a *demotion*, but did not find grounds for a *termination*. After making a timely claim for damages with the city, the officer filed a complaint for damages, but did not seek administrative mandate. A general demurrer to the entire complaint was sustained without leave to amend based on the plaintiff's failure to exhaust his administrative remedies.

The appellate court reversed. In reversing, the court took pains to explain that the officer had not failed to exhaust his *administrative* remedies – after all, he had taken every avenue the city had given him. Rather, by not using administrative mandate to challenge the quasi-judicial civil service determination, he had allowed certain *issues* to be conclusively adjudicated against him. (See *id.* at p. 245.) By not seeking administrative mandate to overturn the determination that he had been properly demoted for disciplinary reasons, he had allowed that essentially judicial determination to become final. As a matter of collateral estoppel, then, he could not claim that his *demotion* was wrongful, and therefore he had no causes of action for the wrongful deprivation of job benefits. (*Ibid.*)

On the other hand, the *Knickerbocker* court ruled that the officer's causes of action for emotional distress based

on his alleged wrongful *firing* could survive the failure to seek mandate. The court noted that "nothing in the prior adjudication" prevented the adjudication of these causes of action because the civil service commission did not find "grounds to fire him." (*Id.* at p. 245.) A general demurrer was therefore improper. (*Id.* at pp. 245-246.)

The *Knickerbocker* court noted that the origins of making administrative mandate a prerequisite for other causes of action could be traced to *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, which involved a physician's tort suit against a hospital for revoking hospital staff privileges. (See *Knickerbocker, supra*, 199 Cal.App.3d at 240.) The high court there held that because the tort suit was necessarily predicated on the idea that the revocation of privileges was erroneous and unjust, a suit for damages was not appropriate as long as the hospital's administrative determination had not been set aside. (See *Westlake, supra*, 17 Cal.3d at p. 484.) In essence, the *Westlake* court was saying that quasi-judicial administrative decisions should be accorded the same res judicata effect as other judicial decisions. (See *ibid.*; see also *Knickerbocker, supra*, 199 Cal.App.3d at p. 241.)

Later cases, in discussing the res judicata and collateral estoppel effects identified in *Westlake* and *Knickerbocker*, would style administrative mandate as the "'exclusive *judicial* remedy for reviewing administrative action.'" (See *Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 410, quoting *McDaniel v. Board of Education* (1996) 44 Cal.App.4th 1618, 1621, quoting *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 646, original emphasis.) By that, the courts meant that the administrative action *as such* could

only be challenged in administrative mandate. They did not mean, of course, than [sic] any time a plaintiff might have causes of action in addition to administrative mandate that he or she is automatically relegated to administrative mandate exclusively.

The dispositive fact here is that the civil rights and antitrust causes of action were not based on the denials of a permit as such, but on unequal treatment. To put it another way, those causes of action would be viable even if the city council had voted to give South Coast Cab its requested permits, because those causes of action were based on South Coast Cab's being required to undergo the permit process when its competitors were not.

The due process claims, on the other hand, were necessarily predicated on the impropriety of the permit denials as such – the right that was being denied without "due" process was the right to operate a taxicab business in the city. Therefore the demurrer was properly sustained without leave to amend as to those claims.

In sum, at least for purposes of demurrer, South Coast Cab's Unruh Act and antitrust claims in its first amended complaints were not subject to demurrer because of the absence of a completed administrative mandate proceeding, and the judgment, as we have now amended it to reflect the trial court's intention, should not have dismissed those causes of action on that basis.

The parties have not briefed the merits of the Unruh Act causes of action *apart from* their relationship to administrative mandate. Accordingly, we express no opinion in regard to any other challenges that might be made to the merits of those causes of action, including on demurrer. Our opinion today is without prejudice to the

city as to the Unruh Act causes of action except on the sole question of the exclusiveness of the mandate remedy.

As for the antitrust cause of action, the city makes one additional argument besides the exclusiveness of administrative mandate: That it has blanket immunity from antitrust statutes. The answer to this assertion is, not quite. Of course, South Coast Cab could not bring an antitrust challenge to the necessity requirement in Anaheim's Municipal Code. A state policy to "displace competition with regulation or monopoly public service," no matter how anticompetitive its economic effect, *is* exempt from antitrust challenge. (See *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 658-659.) But the idea of a *per se* municipal exemption from antitrust laws does not stand up either. As our Supreme Court noted in *Fisher*, a court majority opinion in *City of Lafayette v. Louisiana Power & Light Co.* (1978) 435 U.S. 389 "rejected the argument that the . . . municipalities . . . were immune from antitrust scrutiny." (See *Fisher, supra*, 37 Cal.3d at p. 658.) Emphasizing the point, our high court quoted Justice Brennan's plurality opinion in *Lafayette* rejecting "'the contention that municipalities, *simply by reason of their status as such*, are exempt from antitrust laws.'" (*Fisher, supra*, 37 Cal.3d at p. 658, emphasis added.)

Here, we need only note that South Coast Cab's antitrust challenge is *not* predicated on the anticompetitive effect of the necessity requirement set forth in the city's ordinance. The antitrust claims are predicated on the anticompetitive effect of the *custom* of the city, independent of its ordinances, of allegedly allowing existing permit holders to obtain additional permits when potential competitors were forced to go before the city council. Beyond that, we need not comment further, or explore

whatever other defenses Anaheim might have to South Coast Cab's claims under substantive antitrust doctrine.

MERITS OF THE ADMINISTRATIVE MANDATE ACTION

While South Coast Cab has brought several constitutional challenges to Anaheim's public convenience and necessity requirement for new taxi cab applications, we need only discuss one of them, namely that the ordinance is void for vagueness. The basic parameters of the doctrine were articulated in this oft-quoted language from *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108: "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." (*Ibid.*)[5]

Interestingly enough, while the second value implicated by the vagueness doctrine – preventing arbitrary and discriminatory enforcement – sounds like the need for

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[5] *Grayned* turned back a vagueness challenge to an antinoise ordinance because it was clear the ordinance "as a whole" prohibited, namely disruption of normal school activity. (See *Grayned, supra*, 408 U.S. at p. 110.)

equal protection of the laws (see, e.g., *Rhode Island Medical Soc. v. Whitehouse* (D.R.I. 1999) 66 F.Supp.2d 288, 310 [vagueness undermines "public confidence that the laws are equally enforced"]), the vagueness doctrine itself is an aspect of the due process clause. (See *Grayned, supra*, 408 U.S. at p. 108.) In any event, the prevention of discriminatory treatment certainly lies at its core. Indeed, one commentator has suggested that the most persuasive justification for "vagueness review" is to guard against the danger of discriminatory treatment. (See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va.L. Rev. 189, 218 (1985).) The constitutional infirmity of vagueness is that "fundamentally legislative decisions" are made at the "point of enforcement rather than enactment." (*Record Head Corporation v. Sachen* (7th Cir. 1982) 682 F.2d 672, 674.)

The danger of discretion at the point of enforcement is illustrated by *Kolender v. Lawson* (1983) 461 U.S. 352, which struck down as unconstitutionally vague a California anti-vagrancy statute that allowed police officers to ask anyone on a street for "'credible and reliable' identification and to account for their presence." (*Kolender, supra*, 461 U.S. at p. 353.) The statute failed constitutional muster because it gave "full discretion" to police to determine whether a suspect had provided "'credible and reliable identification.'" (See *Kolender, supra*, 461 U.S. at p. 360.) The *Kolender* court emphasized that without "minimal guidelines," the statute allowed officers to [sic] "'to pursue their personal predilections.'" (*Kolender, supra*, 461 U.S. at p. 358, quoting *Smith v. Goguen* (1974) 415 U.S. 566, 575.).)

The theme against unfettered discretion on the part of local officials to *define* terms of an ordinance at the point

of enforcement is also illustrated in the United States Supreme Court's latest foray into the vagueness doctrine, *City of Chicago v. Morales* (1999) 527 U.S. 41. *Morales* struck down an Illinois anti-gang loitering ordinance because it gave police "'absolute discretion'" (as the Illinois Supreme Court had interpreted that state's law) to "'determine what activities constitute loitering.'" (*Id.* at p. 61.)

While economic regulations, as such, are subject to a lesser standard of scrutiny under the vagueness doctrine (see *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1981) 455 U.S. 489, 498-499 ["economic regulation is subject to a less strict vagueness test"], the doctrine still applies to them. (See *id.* at p. 495, fn 7 [economic regulations will not pass vagueness test when "no standard is specified at all"].) Moreover, just because an ordinance appears to regulate some aspect of economic behavior does not necessarily mean it is an economic, as distinct from a penal, regulation. Some seemingly economic regulations will be treated as penal laws when they operate not as regulations, but as flat bans on behavior.

The point illustrated in the contrast between *Village of Hoffman Estates, supra*, 455 U.S. 489 and a case decided soon thereafter, *Record Head Corporation v. Sachen, supra*, 682 F.2d 672, both of which involved local anti-drug paraphernalia ordinances. In *Village of Hoffman Estates*, the ordinance at issue merely required a shopkeeper to obtain a license if the shop sold items "'designed or marketed for use with illegal cannabis or drugs.'" (*Village of Hoffman Estates, supra*, 455 U.S. at p. 491.) The ordinance was not unconstitutionally vague because the phrase "designed for use" was sufficiently clear in context. (See *id.* at p. 501.) On the other hand, the ordinance in *Record*

Head Corporation did not merely regulate the behavior of ongoing businesses by requiring a license, but contained a flat ban on sales of drug-related "instruments." The court distinguished the licensing regime in *Village of Hoffman Estates* from the flat ban before it, and treated the ordinance as a criminal statute (see 682 F.2d at pp. 675-676). So treated, the *Record Head Corporation* court found the ordinance unconstitutionally vague, largely because the definitional factors bearing on whether an item was "intended for use" with an illegal drug were too subjective, and therefore left to the arresting or prosecuting authorities the job of determining, "without legislative guidance," what the prohibited offense was. (*Id.* at p. 678; see also pp. 676-677.)

But regardless of whether an ordinance is economic or penal, however, the vagueness doctrine is highly contextual and fact-specific. The doctrine cannot be "mechanically applied." (*Village of Hoffman, supra*, 455 U.S. at p. 498.) It is "inherently fact-based." (*Rhode Island Medical Soc. v. Whitehouse, supra*, 66 F.Supp.2d 288 at p 910). By the same token, like the analogous problem of ambiguity in contracts, vagueness does not exist in the abstract. (Cf. *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265 [contractual ambiguity does not exist in a vacuum].) Just like insurance contracts that require interpretation in context, so vagueness is not merely a question of abstract philology (cf. *Ibid.*), but arises "as applied." (See *Village of Hoffman, supra*, 455 U.S. at p. 500 [statute was "sufficiently clear as applied"].) Thus an ordinance need not be vague in all possible applications to fail the vagueness test in a specific context. (*Kolender v Lawson, supra*, 461 U.S. 352, 358, fn. 8 [rejecting dissent's position that vagueness doctrine requires vagueness in all possible applications].)

Like the vagueness doctrine itself, the jurisprudence bearing on the phrase "public convenience and necessity" has also been contextual and fact-specific. The United States Supreme Court has made it clear that a convenience and necessity standard is to be "interpreted by its context." (See *Fahey v. Mallonee* (1947) 332 U.S. 245, 253 [otherwise vague delegation to regulate banks was "sufficiently explicit, against the background of custom, to be adequate"]).

The contextual and fact-specific nature of the words public convenience and necessity was emphasized in an early FCC (then the FRC) case involving a dispute over radio frequencies. Noting that the FCC was "required to act 'as public convenience, interest or necessity requires,'" the United States Supreme Court observed, "[t]he requirement is to be interpreted by its context," and other factors specific to the nature of the regulated activity. (*Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.* (1933) 289 U.S. 266, 285.)

In the context of the present case, we may begin by noting what the federal appellate court for the D.C. Circuit once observed in passing in an Interstate Commerce Commission case: namely, that the words "public convenience" and "necessity" *are* vague. (See *Association of American Railroads v. I.C.C.* (D.C. Cir. 1988) 846 F.2d 1465, 1467.) Of course, as we have just gone to some length to demonstrate, the vagueness does not arise in the abstract; and indeed reference to "'other definable sources'" will allow an otherwise vague ordinance to survive a void-for-vagueness due process challenge. (*People v. Lewis* (1983) 148 Cal.App.3d 614, 617, quoting *American Civil Liberties Union v. Board of Education* (1963) 59 Cal.2d 203, 218.)

Here, however, the regulatory scheme accompanying Anaheim's "public convenience and necessity" requirement for new taxi permits underscores, rather than cures, the vagueness of the word "necessity" as the ordinance is applied here. The "convenience" requirement might perhaps be understood by reference to objective criteria bearing on consumer service, such as requirements for a certain amount of insurance, radio dispatch capacity, and having enough taxis to service all areas of a geographically large city (to avoid the problem of having all the taxis in the city bunched up in the Disneyland area). (See *Village of Hoffman Estates, supra*, 455 U.S. at p. 504 [a government entity "may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance"].)

But the "necessity" requirement in the context of this case is hopelessly procrustean and manipulable by local officials "at the point of enforcement," i.e., by the city council on an ad hoc basis. Thus we need not decide in this case whether that requirement – given the city's flat ban on operating a taxi without a permit obtained by an affirmative showing of need – is economic or penal; the absence of *any* specified standard means that the ordinance is unconstitutionally vague. (See *Village of Hoffman Estates, supra*, 455 U.S. at p. 495, fn. 7 [an economic regulation will be void for vagueness when "no standard conduct is specified at all"].)

"Need" in the context of the demand for taxi services in a city like Anaheim with a core entertainment district and outlying suburbs is a standard that virtually invites arbitrary and selective enforcement. Unlike the demand for *emergency* ambulance services (e.g., *Bell v. City of Mountain View* (1977) 66 Cal.App.3d 332; *Subriar v. City*

of Bakersfield (1976) 59 Cal.App.3d 175), the demand for taxis in a city like Anaheim is relatively elastic. How many trips from bars and restaurants to private residences (particularly when the consumer may have had a little too much to drink) would be made but are not now because the lack of competition has meant slower response times or higher rates than would otherwise be the case? How many trips to the airport are now being made by shuttle services (often with minimum pickup requirements) that would be made by taxis if rates were lower because there was more competition?[6] Without any objective verifiable standards to ascertain need (we cannot infer that just because some *businesses* in the city think existing service is "adequate" that *demand* for more taxi service would not be greater if there were more competition)[7] any

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[6] Increased competition might prompt cab companies to compete with each other in ways other than sales, e.g., annuities, pick-up times, or even just spiffier service.

[7] One of the issues that we do not reach is whether substantial evidence supported the city council's determination, a hopeless task in any event given the vagueness of what "need" is. That said, it is clear that the overwhelming weight of the evidence is that there are a lot of businesses and consumers in Anaheim who were not happy with existing taxi service in the city when South Coast Cab made its last application. Here is what the city staff, who recommended *against* South Coast Cab's application, found:

– 33 percent of Anaheim businesses said "[t]here are usually not enough taxicabs" in Anaheim, and another 12 percent said that there are "usually enough" taxicabs *except* during conventions. Only *three percent* said that there are usually "more than enough" taxicabs in the city.

– A "majority" of Anaheim businesses reported that actual taxicab response time in the city was longer than what they preferred.

– A third of those surveyed said that between 10 to 25 percent of the time a taxicab was not available within "the desired response time."

(Continued on following page)

newcomer's application is inherently susceptible to rejection at will.

One of the reasons economic regulations undergo a lesser standard of vagueness scrutiny than penal ordinances is that a regulated enterprise will presumably "have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." (*Village of Hoffman Estates, supra*, 455 U.S. at p. 498; *National Paint & Coatings Assn. v. City of Chicago* (N.D. Ill. 1992) 803 F.Supp. 135, 148.) Here, however, there was nothing South Coast Cab could do to pin down the city as to what might constitute existing "need."[8]

Subriar v. City of Bakersfield, supra, 59 Cal.App.3d 175, the case relied on by the city to withstand the vagueness challenge, is unpersuasive. *Subriar* never really satisfactorily confronted the vagueness issue. *Subriar* involved an application to operate an ambulance service in the City of Bakersfield. The applicant made no attempt to provide any information "to show that public convenience and necessity required the issuance of a certificate" of

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A private consultant who testified for South Coast Cab presented evidence that 71 percent of the city's chamber of commerce members wanted more cabs.

[8] *Yellow Cab Co v City of Chicago* (Ill 1947) 71 N E.2d 652, though it did not involve a vagueness challenge to a public convenience and necessity standard, does illustrate just how manipulable such a standard is. The case centered on a challenge by two existing operators to the cancellation of some of their licenses because they couldn't keep enough of their taxis in service, World War II having made it difficult to get spare parts The opinion observed in passing that the city's regulatory authorities could at one point consider the "public convenience and necessity" to be served by *eliminating* taxis and at another point served by increasing them. (See *id* at pp. 654-655)

operation, choosing to make a facial attack on the ordinance. (*Id.* at p. 180.) The trial court held the local ordinance unconstitutional, but the appellate court reversed. While pages 202 through 206 of the opinion in the official reporter purport to discuss the problem of vagueness (under the question of whether the lack of "standards or criteria for the determination of what constitutes 'public convenience and necessity,'" see *id.* at p. 202), the court never really confronted the problem of vagueness as such. The court simply *presumed* that local authorities would not act arbitrarily. (See *id.* at p. 205.)

The *Subriar* court's reasoning is not persuasive in the context of a vagueness challenge, because the whole point of the vagueness doctrine, as made clear by the United States Supreme Court authorities we have discussed above,[9] is to avoid a situation where local authorities *can* act arbitrarily.

The closest the *Subriar* court came to confronting the fact that a vague law allows unequal treatment at the point of enforcement was to allude to the "deplorable conditions" that existed prior to the enactment of the city's ambulance ordinance, and say "[s]ufficient standards are inherent in the reasons leading to the adoption of the ordinance. This purpose supplies standards which the city manager must observe in granting or denying the permits." (*Id.* at p. 205.) That justification also fails because the "deplorable conditions" to which the court referred –

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[9] The *Subriar* court either ignored or was oblivious to any of the vagueness case law from the United States Supreme Court. (See *Subriar, supra*, 59 Cal.App 3d at pp 202-206)

"unsafe, unsanitary, or otherwise inadequate" ambulance service – only bore on the "public convenience" prong of the ordinance, and did nothing to curtail the ability of local officials to arbitrarily discriminate because of the lack of definition in the "necessity" prong. It is one thing to require a regulated business to demonstrate certain definable attributes that bear on customer *service* (like numbers of vehicles, proper condition of vehicles, minimum equipment requirements, dispatch capacity and so forth), quite another to peg market entry on what some official thinks ever-changing local "needs" are.

Subriar is also factually inapposite because of basic differences between the taxi and ambulance markets. Ambulance services provide both emergency and non-emergency services. As it turns out, *non*emergency ambulance services tend to be more profitable than emergency services (see *Gold Cross Ambulance and Transfer v. City of Kansas City* (8th Cir. 1983) 705 F.2d 1005, 1009), and there is a real danger that unless emergency ambulance services are provided on a public utility model that *guarantees* them, there will be some rather horrendous results. Of all the services in the world, *emergency* ambulance services are perhaps the most inelastic in terms of demand or a consumer's ability to go into the marketplace for substitutes: When you are in danger of bleeding to death after an auto accident it is vital that there be at least one ambulance service that has dedicated vehicles to get you to the nearest hospital or emergency room and you are in no position to shop around. It is thus possible to say, *in the ambulance context*, that a city's ambulance "needs" are being met if there is *at least one* guaranteed provider who can respond within acceptable time parameters. (Cf. *Ibid.*)

The same cannot be said in the relatively elastic taxi market. Unlike emergency ambulance services, consumers have a number of alternatives to taxis – rented cars, shuttles, public buses, limousines, and even walking. Demand for taxi services varies with price and quality of service.

DISPOSITION

We first amend the judgment to include the trial court's implied dismissals of the first five causes of action brought by South Coast Cab in its first amended complaint, that is, the Unruh Act, due process, and antitrust causes of action. As amended, we reverse the amended judgment as to the Unruh Act, antitrust, and administrative mandate causes of action, but affirm it as to the due process cause of action. The Unruh Act and antitrust causes of action set forth in the first amended complaint are once again viable.[10]

As to the administrative mandate cause of action set forth in the second amended complaint, we not only reverse the judgment, but order the trial court to enter a new judgment in favor of South Coast Cab, i.e., directing the city to issue the permits applied for in the April 1999 application. South Coast Cab will recover its costs on appeal.

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[10] For housekeeping purposes, South Coast Cab should be allowed to file a third amended complaint acting forth those causes of action, so that whoever is assigned the case can deal with just document at the top of the file, rather than having to refer back to the first amended complaint.

SILLS, P.J.

WE CONCUR:

CROSBY, J.

O'LEARY, J.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTH COAST CAB CO., ET AL.,	) Case No. SA CV-99-416-GLT (ANx)
Plaintiffs,	) ORDER DENYING MOTION TO REOPEN CASE
v.	)
THE CITY OF ANAHEIM, ET AL.	) CALENDAR ITEM #8 (Filed Aug. 18, 2003)
Defendants.	)

The motion to reopen the case is DENIED.

I. BACKGROUND

This motion arises out of lawsuits brought by Plaintiffs South Coast Cab Co. ("SCC") and its owners Savvas and Irene Roditis against Defendants The City of Anaheim ("Anaheim") and city employees LaRochelle and Poole. SCC is a taxi cab company. In early 1999, Plaintiffs filed a 42 U.S.C. § 1983 suit in this Court claiming Defendants unconstitutionally deprived them of the right to run their business in Anaheim. Concurrent with the federal § 1983 suit, Plaintiffs filed Sherman Act anti-trust claims and Unruh Act claims in state court. The state court dismissed Plaintiffs' Sherman and Unruh Act claims and determined the Plaintiffs only state court remedy was administrative mandamus.

On March 1, 2000, this Court granted Defendant's motion for a stay of the federal proceedings based upon *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), pending a final resolution of Plaintiffs' state court claims. On December 18, 2000, the California Court of Appeals

issued a judgment ordering Defendants to provide 117 taxi cab permits to Plaintiffs.

Shortly thereafter, Anaheim altered its permit system, limiting taxi cab permits to 30 per company and requiring all taxi cab companies to apply for a franchise with the City if they wished to operate more than 30 cabs.

Plaintiffs revived their state court Sherman anti-trust and Unruh Act claims in state court. Plaintiffs also requested their federal claims in this Court reopened. On November 29, 2001, this Court again granted Defendants' motion for a stay pursuant to *Pullman* abstention. The state courts continue to adjudicate the status of Anaheim's franchise system.

Plaintiffs now move to lift this Court's stay and reopen their case, and amend their Complaint to include Sherman Act claims. Defendants argue Plaintiffs have waived the right to return to this court under the *England* doctrine.

II. DISCUSSION

"In order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication," a district court may stay its proceedings in deference to state courts under the *Pullman* abstention doctrine. *Pearl Inv. Co. v. City and County of San Francisco*, 774 F.2d 1460, 1462 (9th Cir. 1985) (citing *Harman v. Forssenius*, 380 U.S. 528, 534 (1965)). A plaintiff must then bring to the state court all federal claims to allow that court to consider state claims

"in light of" the federal issues. *Government & Civic Employees Organizing Comm. v. Windsor*, 353 U.S. 364, 366 (1957). The plaintiff may (1) ". . . freely and without reservation [present] her constitutional concerns to the state court, [litigate] them there, and [have] them decided there," which will "forego her right to return to federal court," or (2) "notify the state court of [the] constitutional objections but . . . explicitly reserve federal jurisdiction over them. . . ." *Gottfried v. Medical Planning Servs.*, 142 F.3d 326, 333 (6th Cir. 1998) (citations omitted).

The second option, known as an "*England* reservation," exists to guarantee plaintiffs do not lose the ability to have federal claims heard in federal court. *See England v. Louisiana State Bd. Of Med. Exam'rs*, 375 U.S. 411, 467-68 (1964). To make an effective reservation, it must be part of the state court record, and be brought to the state court's attention. *See Lurie v. California*, 633 F.2d 786, 788 (9th Cir. 1980). If there is no "effective" reservation of the federal claims, a plaintiff's remedies lie in the state courts only. *See Id* (Federal Court claims precluded where plaintiffs explicitly submitted and argued claims to state court).

Plaintiffs argue the state court was fully aware of the federal claims in this Court. Plaintiffs note: (1) a state court judge suggested Plaintiffs pursue a federal injunction; (2) Plaintiffs filed notice of a related case; (3) Plaintiffs requested that the state court reserve their Sherman Act claims if Defendants' Motion for Judgment on the Pleadings was granted; and (4) Defendants' Motion for Judgment on the Pleadings was an implicit *England* reservation, because Defendants successfully argued the Sherman Act claims should be decided in federal court.

Plaintiffs have not shown they properly reserved their Sherman Act claims. Plaintiffs presented their Sherman Act claims to the state court without any *England* reservation in the Complaint. Upon Defendants' Motion for Judgment on the Pleadings, Plaintiffs requested, "if the motion were granted," the state court reserve Sherman Act adjudication for this Court. In other words, Plaintiffs wished to fully pursue the Sherman Act claims if the state court ruled in its favor, but make an *England*-like reservation if the state court decided against them. Plaintiffs' conduct is an impermissible misuse of the *England* reservation because they tried to pursue their Sherman Act claims in state court, when it appears they now wish to assert them in federal court. *See United Parcel Serv. v. California*, 77 F.3d at 1185 ("*England* does *not* afford a litigant two bites at the apple.").

Plaintiffs have not shown they reserved their 42 U.S.C. § 1983 claim. Plaintiffs make no mention in their briefing papers of the § 1983 claim's status in state court. The Court must presume they were not reserved, and therefore waived.

Plaintiffs' Motion to Reopen is DENIED. The stay remains in effect.

Because the Court has declined to lift the stay, the request for a temporary restraining order is DENIED, and a hearing for a preliminary injunction is not set.

DATED: August 18, 2003.

/s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No SA CV 99-416 GLT (ANx)

Date: February 29, 2000

Title: SOUTH COAST CAB CO., et al. v. THE CITY OF ANAHEIM, et al.

DOCKET ENTRY

I hereby certify that this document was served by first class mail, postage prepaid, to all counsel for parties at their respective most recent address of record in this action on this date,
date _____

_____
Deputy Clerk

PRESENT:

HON. Gary L. Taylor JUDGE

Kathleen Gault-Peterson	None Present
Deputy Clerk	Court Reporter (SM)

ATTORNEYS PRESENT FOR PLAINTIFFS	ATTORNEYS PRESENT FOR DEFENDANTS
None Present	None Present

PROCEEDINGS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE TO STAY

[In Chambers]

Defendants have moved to stay this action until after the California Court of Appeals decides Plaintiffs' pending appeal of the Superior Court's denial of their request for a writ of mandate.

Under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), a federal court should stay its decision on a constitutional question until after the conclusion of proceedings in state court when: (1) the complaint involves a "sensitive area of social policy" that is best left to the states to address, (2) "a definitive ruling on the state issues by a state court could obviate the need for constitutional adjudication by the federal court", and (3) "the proper resolution of the potentially determinative state law issue is uncertain." *Cedar Shake* and *Shingle Bureau v. City of Los Angeles,* 997 F.2d 620, 622 (9th Cir. 1993)

This action turns on constitutional questions, and a stay appears warranted under *Pullman* Taxicab regulation is a matter best-suited to local regulation, the decision of the California Court of Appeals could eliminate the need for resolution of the constitutional issues presented in this action, and the appellate court's resolution of the state law issues is uncertain.

Moreover, it appears this action presents constitutional issues which were already argued in the state action. See, e.g., RT 70-76. Though Plaintiff here seeks relief under 42 U.S.C. § 1983, rather than a writ of mandate against the City, the underlying constitutional issues are identical. Under California law, the judgment of the Superior Court is not "final" while an appeal is pending. *Abelson v. National Union Fire Ins. Co.,* 28 Cal App 4th 776, 787 (1994). If the judgment becomes "final," however, Plaintiff may be barred by either res judicata or collateral

estoppel from re-litigating these issues. A stay pending the ruling of the California Court of Appeals in the state action will avoid potential duplicate (and unnecessary) litigation.

Defendants' motion for a stay is GRANTED and the Court declines to consider any other matters in this action at this time. The hearings set for March 6, 2000 are taken off calendar.

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

SOUTH COAST CAB CO., INC. et al., Plaintiffs and Appellants,	G030551
	Sup. Ct. No. 800359
v.	ORDER
CITY OF ANAHEIM et al., Defendants and Respondents.	(Filed May 19, 2003)

The petition for rehearing is DENIED.

SILLS, P.J.
SILLS, P.J.,

WE CONCUR:

RYLAARSDAM, J.
RYLAARSDAM, J

O'LEARY, J.
O'LEARY, J.

cc: See attached list.

Court of Appeal, Fourth Appellate District, Division Three – No. G030551

S116113

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SOUTH COAST CAB CO., INC., Plaintiff and Appellant,

v.

CITY OF ANAHEIM et al., Defendants and Respondents.

(Filed Jul. 16, 2003)

Petition for review DENIED.

Brown, J., was absent and did not participate.

/s/ George
Chief Justice

UNITED STATES CONSTITUTION

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives

in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an Officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

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42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CALIFORNIA GOVERNMENT CODE

§ 53075.5 Taxicab transportation services

(a) Notwithstanding Chapter 8 (commencing with Section 5351) of Division 2 of the Public Utilities Code, every city or county shall protect the public health, safety, and

welfare by adopting an ordinance or resolution in regard to taxicab transportation service rendered in vehicles designed for carrying not more than eight persons, excluding the driver, which is operated within the jurisdiction of the city or county.

(b) Each city or county shall provide for, but is not limited to providing for, the following:

(1) A policy for entry into the business of providing taxicab transportation service. ***The policy shall include, but need not be limited to, all of the following provisions:***

(A) Employment, or an offer of employment, as a taxicab driver in the jurisdiction, including compliance with all of the requirements of the program adopted pursuant to paragraph (3), shall be a condition of issuance of a driver's permit.

(B) The driver's permit shall become void upon termination of employment.

(C) The driver's permit shall state the name of the employer.

(D) The employer shall notify the city or county upon termination of employment.

(E) The driver shall return the permit to the city or county upon termination of employment.

(2) The establishment or registration of rates for the provision of taxicab transportation service.

(3) (A) A mandatory controlled substance and alcohol testing certification program. The program

shall include, but need not be limited to, all of the following requirements:

(i) Drivers shall test negative for each of the controlled substances specified in Part 40 (commencing with Section 40.1) of Title 49 of the Code of Federal Regulations, before employment. Drivers shall test negative for these controlled substances and for alcohol as a condition of permit renewal or, if no periodic permit renewals are required, at such other times as the city or county shall designate. As used in this section, a negative test for alcohol means an alcohol screening test showing a breath alcohol concentration of less than 0.02. percent.

(ii) Procedures shall be substantially as in Part 40 (commencing with Section 40.1) of Title 49 of the Code of Federal Regulations, except that the driver shall show a valid California driver's license at the time and place of testing, and except as provided otherwise in this section. Requirements for rehabilitation and for return-to-duty and followup testing and other requirements, except as provided otherwise in this section, shall be substantially as in Part 382 (commencing with Section 382.101) of Title 49 of the Code of Federal Regulations.

(iii) A test in one jurisdiction shall be accepted as meeting the same requirement in any other jurisdiction. Any negative test result shall be accepted for one year as meeting a requirement for periodic permit renewal testing or any other periodic testing in that jurisdiction or any other jurisdiction, if the driver has not tested positive subsequent to a negative result. However, an earlier negative result shall

not be accepted as meeting the pre-employment testing requirement for any subsequent employment, or any testing requirements under the program other than periodic testing.

(iv) In the case of a self-employed independent driver, the test results shall be reported directly to the city or county, which shall notify the taxicab leasing company of record, if any, of positive results. In all other cases, the results shall be reported directly to the employing transportation operator, who may be required to notify the city or county of positive results.

(v) All test results are confidential and shall not be released without the consent of the driver, except as authorized or required by law.

(vi) Self-employed independent drivers shall be responsible for compliance with, and shall pay all costs of, this program with regard to themselves. Employing transportation operators shall be responsible for compliance with, and shall pay all costs of, this program with respect to their employees and potential employees, except that an operator may require employees who test positive to pay the costs of rehabilitation and of return-to-duty and followup testing.

(vii) Upon the request of a driver applying for a permit, the city or county shall give the driver a list of the consortia certified pursuant to Part 382 (commencing with Section 382.101) of Title 49 of the Code of Federal Regulations that the city or county knows offer tests in or near the jurisdiction.

(b) No evidence derived from a positive test result pursuant to the program shall be admissible in a criminal prosecution concerning unlawful possession, sale or distribution of controlled substances.

(c) Each city or county may levy service charges, fees, or assessments in an amount sufficient to pay for the costs of carrying out an ordinance or resolution adopted in regard to taxicab transportation services pursuant to this section.

(d) Nothing in this section prohibits a city or county from adopting additional requirements for a taxicab or operate in its jurisdiction.

(e) For purposes of this section, "employment" includes self-employment as an independent driver.

CALIFORNIA PUBLIC UTILITIES CODE

§ 6001. Franchises subject to application of article

Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for light, heat, or power, to erect poles or wires for transmitting electricity for light, heat, or power, along or upon any public street or highway, or to exercise any other privilege whatever proposed to be granted by the governing or legislative body of any county, city and county, or city shall be granted upon the conditions in this article provided, and not otherwise, except when such franchises are granted pursuant to Chapters 2 or 3 of this division.

This article does not apply to franchises or privileges for railroads, or telegraph or telephone lines doing an interstate business, or to renewals of franchises for piers, chutes, or wharves, or to community antenna television systems, or to franchises or privileges for purposes not involving the furnishing of any service or commodity to the public or any portion thereof.

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§ 6003. Discrimination or favoritism in offering franchise or grant for sale

No clause or condition of any kind shall be inserted in any franchise or grant offered or sold under the terms of this article which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale, which shall in anywise favor one person, firm, or corporation, as against another, in bidding for the purchase thereof.

ANAHEIM MUNICIPAL CHARTER

Section 1400. GRANTING OF FRANCHISES.

Any person, firm or corporation furnishing the City or its inhabitants with transportation, communication, terminal facilities, water, light, heat, electricity, gas, power, refrigeration, storage or any other public utility or service, or using the public streets, ways, alleys or places for the operation of plants, works or equipment for the furnishing thereof, or traversing any portion of the City for the transmitting or conveying of any such services elsewhere, may be required by ordinance to have a valid and

existing franchise therefor. The city Council is empowered to grant such franchise to any person, firm or corporation, whether operating under an existing franchise or not, and to prescribe the terms and conditions of any such grant. It may also provide, by procedural ordinance, the method of procedure and additional terms and conditions of such grants, or the making thereof, all subject to the provisions of this Charter.

Nothing in this Section, or elsewhere in this Article, shall apply to the City, or to any department thereof, when furnishing any such utility or service.

Section 1405. DUTIES OF GRANTEES.

By its acceptance of any franchise hereunder, the grantee shall covenant and agree to perform and be bound by each and all of the terms and conditions imposed in the grant, or by procedural ordinance and shall further agree to:

(a) Comply with all lawful ordinances, rules and regulations theretofore or thereafter adopted by the City Council in the exercise of its policy power governing the construction, maintenance and operation of its plants works or equipment.

(b) Pay to the City on demand the cost of all repairs to public property made necessary by any of the operations of the grantee under such franchise.

(c) Indemnify and hold harmless the City and its officers and employees from any and all liability for damages proximately resulting from any operations under

such franchise and provide such insurance as the City Council may require.

(d) Remove and relocate without expense to the City any facilities installed, used and maintained under the franchise if and when made necessary by any lawful change of grade, alignment or width of any public street, way, alley or place, including the construction of any subway or elevated transit facilities, or by the construction or improvement of any public property or facility, or if the public health, comfort, welfare, convenience, or safety so demands.

(e) Pay to the City during the life of the franchise a percentage, to be specified in the grant, of the gross annual receipts of the grantee within the limits of the City, or such other compensation as the City Council may prescribe in the grant.

ANAHEIM MUNICIPAL CODE

1.03.060 APPROVAL OF FRANCHISE.

The City Council may, upon reviewing all relevant evidence and determining that the applicant (and the current holder of the franchise, if applicable) is in strict compliance with the Charter of the City and all applicable laws, approve, disapprove, or conditionally approve the application and adopt the resolution of intention to grant said franchise and establish the date for the hearing on the proposed franchise ordinance. (Ord. 5213 § 1 (part); April 16, 1991.)

ANAHEIM MUNICIPAL CODE (1981)

4.72.020 PERMIT REQUIRED.

It shall be unlawful and punishable as a misdemeanor for any owner or driver to operate, or cause to be operated, any taxicab or chauffeured limousine, or to maintain any stand, unless such owner has a permit issued pursuant to Chapter 4.72. (Ord. 4262 § 2 (part); September 8, 1981.)

4.72.030 APPLICATION FOR PERMIT.

Any owner desiring to obtain the permit required by Section 4.72.020 hereof shall make application therefor to the City Council. Each such application shall be accompanied by a bond or policy of insurance and permit fee as are hereinafter provided for, shall be in writing, and shall set forth the following:

.010 The name, age, business and residence addresses of applicant, if a natural person; or if a corporation, its name, date and place of incorporation, address of its principal place of business, and the names of its principal officers, together with their respective residence addresses; or if a partnership, association or unincorporated company, the names of the partners, or of the persons comprising such association or company, and the business and residence of each partner or person;

.020 A description of each taxicab or chauffeured limousine which the applicant proposes to use, the name of the manufacturer, engine and serial numbers, the Sate license number thereof;

.030 The name, monogram or insignia proposed to be used on such taxicab or chauffeured limousine;

.040 The schedule of rates of fare proposed to be charged for carrying passengers in such taxicab(s) or chauffeured limousine(s);

.050 The street number and exact location of the place or places where the applicant proposes to stand each taxicab or chauffeured limousine;

.060 If the applicant desires a stand upon a public highway or street within the City of Anaheim, he shall so state in his application, and shall set forth the names and respective addresses of all lessees, sublessees and owners in actual or constructive possession of the ground floor of any building or parcel of real property contiguous to that portion of highway or street where such stand is proposed to be located; the applicant shall also accompany said application with the written consent of all of said lessees, sublessees and owners of said building or parcel of real property to the location of such stand at the proposed location. The signatures of such lessees, sublessees and owners shall be acknowledged before a duly commissioned notary public;

.070 The applicant shall furnish such additional information as the City Council may require;

.080 If the City Council requires, the applicant or applicants shall appear personally before the City Council, if he, she or they be individuals, and the officers of such applicant shall so appear personally if the applicant be a corporation. (Ord. 4262 § 2 (part); September 8, 1981.)

4.72.040 CRITERIA FOR ISSUANCE OF PERMIT – ISSUANCE AND APPROVAL OF RATES.

Upon receipt of any such application referred to in Section 4.72.030 hereof, the City Council shall make

investigation, and may thereafter grant the same if it shall find:

.010 That the bond or policy of insurance hereinafter required has been furnished, and that the same is in the form required, and that the surety thereon is approved by the City Counsel; and

.020 That each taxicab or chauffeured limousine described therein is adequate and safe for the purpose for which it is to be used, and is equipped as herein required; and

.030 That the applicant is of good moral character, has complied with all the terms and conditions of this chapter and is competent to operate a taxicab or chauffeured limousine; and

.040 That the public convenience or necessity require the operation of such taxicab(s) or chauffeured limousine(s) within the City of Anaheim; and

.050 That the name, monogram or insignia to be used upon such taxicab(s) or chauffeured limousine(s) is not in conflict with and does not imitate any other name, monogram or insignia used by any other person, firm or corporation heretofore licensed by said City Council, in such manner as to be misleading or tend to deceive or defraud the public; and

.060 In case of an application for a stand, that the location of said stand is such that it will not congest or interfere with travel on any public highway or street, and is not prohibited by any ordinance of the City of Anaheim;

.070 That the schedule of rates of fare proposed to be charged are fair and reasonable;

.080 That applicant is adequately financed in order to provide the service intended;

.090 That applicant has available bilingual drivers and dispatchers;

.100 That applicant has sufficient number of vehicles to adequately service the entire City;

.110 That all vehicles are radio equipped for dispatch.

The granting of said permit shall constitute the approval of the City Council of the proposed schedule of rates. (Ord. 4262 § 2 (part); September 8, 1981; Ord. 4316 § 1) March 23, 1982.)

4.72.200 USE OF ADDITIONAL VEHICLES.

In the event that any holder of a permit issued pursuant to the provisions of this chapter should desire to operate any taxicab or chauffeured limousine in addition to those specified in his permit, he shall apply to the Chief of Police for permit so to do. Such application shall be accompanied by all pertinent information and data required to be furnished by Section 4.72.030 hereof, and shall be accompanied by a bond or policy of insurance of the type required by Section 4.72.090 hereof. In the event the Chief of Police finds that such taxicab or chauffeured limousine fulfills the requirements set forth in this chapter, he shall grant a permit, permitting such addition. The City Council shall have the power to review any action taken by the Chief of Police in denying any application for a permit and shall have the power to revoke a permit granted by the Chief of Police when, in the opinion of the City Council, such action on its part is in the public interest.

The applicant may appeal the ruling of the Chief of Police by application to the City Council according to the provisions of Sections 4.72.030 and 4.72.040 hereof. The findings and decision of the City Council upon such appeal shall be final. (Ord. 4262 § 2 (part); September 8, 1981.)

Anaheim Municipal Code (1998)

4.72.010 DEFINITIONS.

Unless the particular provision of the context otherwise requires, the definitions and provisions contained in this section all govern the construction, meaning, and application of words and phrases used in this chapter.

.010 "City" means the City of Anaheim.

.020 "City authorization" means City authorization to operate a taxicab business in the City.

.030 "Driver" means a person who drives or controls the movements of a taxicab.

.040 "OCTAP" means the Orange County Taxi Administration Program administered by the Orange County Transportation Authority.

.050 "OCTAP Permit" means and includes the permit issued by OCTAP to operate a taxicab business, to drive a taxicab or to use a particular vehicle as a taxicab.

.060 "Operate a taxicab" means to drive a taxicab and either solicit or pick up passengers for hire in the City.

.070 "Operator" means the person whose name appears on the operator's Permit issued pursuant to the

provisions of this chapter and who is responsible for the day to day operations of the taxicab business.

.080 "Owner" means the registered owner or lessor of a taxicab.

.090 "Permit" means and includes the permit required pursuant to the provisions of the chapter to operate a taxicab business.

.100 "Person" includes natural person, firm, association, organization, partnership, business, trust corporation, or public entity.

.110 "Taxicab" means a vehicle operated within the jurisdiction of the City, capable of carrying not more than eight persons, excluding the driver, and used to carry passengers for hire. The term shall exclude a vehicle operating as a Charter Party Carrier licensed as such by any state agency, including the Public Utilities Commission, or any other vehicle having a Certificate of Public Convenience and Necessity issued by any state agency, including the Public Utilities Commission. (Ord. 5627 § 2 (part); February 10, 1998.)

4.72.020 OPERATOR'S PERMIT REQUIRED.

No person shall operate a taxicab business within the City without first obtaining an operator's permit pursuant to Sections 4.72.030 and 4.72.040 of this chapter. The operator's permit required by this chapter shall be in addition to any business license required by this Code. (Ord. 5627 § 2 (part); February 10, 1998.)

4.72.030 APPLICATION FOR OPERATOR'S PERMIT.

Any person desiring an operator's permit for a taxicab business shall file a written application therefor with the City Council. The application shall be accompanied by the appropriate filing fee established by resolution of the City Council. The application shall be completed and signed by the operator of the proposed taxicab business, if a sole proprietorship; one general partner, if the operator is a partnership; one officer or one director, if the operator is a corporation; and one participant, if the operator is a joint venture. The application for permit does not authorize operation of a taxicab business unless and until such permit has been approved as provided in Section 4.72.040 of this chapter. The application shall be deemed complete if it contains or is accompanied by the following information;

.010 The type of ownership of the business, i.e., whether by individual, partnership, corporation or otherwise. If the applicant is an individual, the application shall set forth the name, age, and business and residence address of the applicant. If the applicant is a corporation, the name of the corporation shall be set forth exactly as shown in its articles of incorporation or charter together with the state and date of incorporation and the names and residence addresses of each of its current officers and directors, and of each stockholder holding more than five percent of the stock of that corporation, such stockholders to be listed in descending order based upon their percentage ownership interest in the corporation. If the applicant is a partnership, the application shall set froth the name and residence address of each of the partners, including limited partners. If the applicant is a limited partnership, it shall attach a copy of its certificate of limited partnership filed

with the Secretary of State to the application. If one or more of the partners is a corporation, the provisions of this subsection pertaining to corporations shall apply. The applicant corporation or partnership shall designate one of its officers or general partners to act as its responsible managing officer. Such designated person shall complete and sign all application forms required for an individual applicant under this chapter, but only one application fee shall be charged. Such responsible managing officer must at all times meet all of the requirements set forth in this section, or the operator's permit shall be suspended until a responsible managing officer who meets all such requirements is designated. If no such person is named within ninety days, the operator's permit shall be deemed cancelled and a new application for an operator's permit must be filed;

.020 The precise name under which the taxicab business is to be conducted;

.030 The complete address and all telephone numbers of the taxicab business;

.040 A description of each vehicle which the applicant proposes to use, including the make, model and year of the vehicle, the engine and vehicle identification numbers and the license plate number of the vehicle. For each such vehicle, the application shall be accompanied by proof that the applicant has obtained an OCTAP Permit for each such vehicle;

.050 A color illustration of the name, monogram or insignia proposed to be used on each vehicle;

.060 A complete current list of the names and residence addresses of all proposed taxicab drivers operating

taxicabs on behalf of the applicant, and the name and residence address of the manager or managing employee proposed to be principally in charge of the operation of the taxicab business. For each proposed taxicab driver, the application shall be accompanied by proof that each such driver has a valid OCTAP Permit authorizing said driver to drive a taxicab;

.070 A copy of the applicant's OCTAP Permit to operate a taxicab business;

.080 Evidence that the public convenience and necessity require the operation of applicant's taxicab business in the City;

.090 Such other additional information as may be required by the City Council;

.100 A statement in writing and dated by the applicant that he/she it certifies under penalty of perjury that all information contained in the application is true and correct;

.110 If, during the term of a permit, any of the information submitted on the original application changes, the operator shall notify the City Council of such change within ten business days thereafter, in writing. (Ord. 5627 § 2 (part); February 10, 1998.)

4.72.040 OPERATOR'S PERMIT ISSUANCE AND DENIAL; CONDITIONS OF APPROVAL.

.010 Upon receipt of a written application for an operator's permit, the City Council shall conduct an investigation to ascertain whether such permit should be issued as requested. The City Council shall, within sixty

days of receipt of an application, conduct a hearing at which oral and documentary evidence is received, and approve, conditionally approve, or deny the application. The sixty day period may be extended for up to thirty additional days, if necessary, to complete the investigation and hearing. The City Council shall issue such permit if the following findings are made:

.0101 The applicant, the applicant's proposed drivers and the applicant's vehicles have all necessary valid, unrevoked and unsuspended OCTAP Permits.

.0102 The public convenience and necessity require the operation of applicant's taxicab business in the City, and the applicant has a sufficient number of vehicles to adequately service the entire City.

.0103 The color of the vehicles to be used or the name, monogram or insignia to be used upon the vehicles is not in conflict with and does not imitate any other name, monogram or insignia used by any other person authorized under this chapter to operate a taxicab business in the City, in such a manner as to be misleading or tend to deceive the public.

.020 The City Council may specify conditions on the issuance of the operator's permit that are reasonably necessary to ensure compliance with this chapter and other laws. (Ord. 5627 § 2 (part); February 10, 1998.)

4.72.045 TAXICAB PERMIT DECALS REQUIRED.

Upon the issuance of an operator's permit pursuant to Section 4.72.040 of this Chapter, the operator shall cause to be affixed upon all vehicles to be used in the operation

of the taxicab business decals issued by the City Code Enforcement Division. Two decals shall be affixed to each such vehicle, one on the left front fender and one on the right front fender of the vehicle. The cost for such decals shall be established by resolution of the City Council. (Ord. 5651 § 1; October 20, 1998.)

4.72.080 ADDITIONAL VEHICLES.

Any permit holder desiring to increase the number of taxicabs specified in his/her/its permit shall apply to the City Council for an amendment to the taxicab permit to allow such increase. Such application shall be accompanied by the appropriate filing fee established by resolution of the City Council and a description of the vehicle(s) to be added, including the make, model and year of the vehicle(s), the engine and vehicle identification numbers and the license plate number of the vehicle(s). The City Council shall grant the amendment to increase the number of taxicabs if it makes the following findings:

.010 The additional vehicle(s) are necessary in order for the permit holder to adequately service the entire City.

.020 The permit holder has obtained an OCTAP Permit for each proposed additional vehicle. (Ord. 5627 § 2 (part); February 10, 1998.)

4.72.100 DRIVER'S PERMIT.

No person shall drive a taxicab in the City or allow any person to drive a taxicab in the City unless such driver has a valid, unrevoked and unsuspended driver's

permit issued by OCTAP. (Ord. 5627 § 2 (part); February 10, 1998.)

4.72.110 TESTING FOR CONTROLLED SUBSTANCES AND ALCOHOL.

Each driver shall test negative for controlled substances and alcohol as required by applicable state statutes. (Ord. 5627 § 2 (part); February 10, 1998.)

4.72.120 INSURANCE REQUIRED.

A driver operating a taxicab in the City shall carry with him/her at all times proof of insurance covering the vehicle, with such policy limits and coverage as established by OCTAP and adopted by separate resolution of the City Council. Said proof of insurance must clearly identify the vehicle covered. (Ord. 5627 § 2 (part); February 10, 1998.)

4.72.130 TAXICAB EQUIPMENT.

A taxicab operated under a permit issued pursuant to this chapter shall be equipped according to the standards established by OCTAP and adopted by separate resolution of the City Council. (Ord. 5627 § 2 (part); February 10, 1998.)

4.72.140 MECHANICAL CONDITION OF TAXICAB.

A taxicab operated under a permit issued pursuant to this chapter shall be maintained according to the standards

established by OCTAP and adopted by separate resolution of the City Council. (Ord. 5627 § 2 (part); February 10, 1998.)

ANAHEIM MUNICIPAL CODE (2001)

4.73.040 NONEXCLUSIVE FRANCHISE - TERMS AND CONDITIONS.

.010 Subject to the limitations of this chapter, the City Council may, and is empowered to, grant by ordinance, to any qualified person, firm, association, corporation, partnership or other entity, a nonexclusive franchise to operate taxicabs within the City in such number as expressly provided in said franchise.

.020 All franchises granted pursuant to this chapter shall be nonexclusive. No provisions of this chapter shall be deemed to require restricting the number of franchises to one or any particular number. However, in the sole exercise of its discretion, and in accordance with the procedures set forth in this chapter, the City Council may limit the number of franchises which may be extant.

.030 All nonexclusive franchises granted hereunder shall be subject to the terms and conditions specified in the City Charter, and in this chapter, and in the ordinance granting the franchise, and in the terms and conditions set forth in the Request for Proposals for Providing Taxicab Service and the responses provided by the franchisee thereto.

.040 In granting any franchise, the City Council may prescribe such terms and conditions, not in conflict with the City Charter or this chapter, as in the judgment of the City Council are in the public interest.

4.73.045 NUMBER OF TAXICABS FRANCHISED.

.010 Initial Taxicab Franchises. Following the adoption of this chapter, the City Council, by ordinance, shall award not more than three franchises for the operation of 230 taxicabs within the City (the "Initial Taxicab Franchises"). Said franchises may also provide for the occasional and temporary operation of additional taxicabs by such franchisees in such numbers and on such days and periods of peak need as may be expressly authorized in said franchise ordinances.

.020 Additional Franchises. Following the adoption of ordinances approving the Initial Taxicab Franchises as provided in subsection .010 above, the application period for taxicab franchises shall be deemed closed and no further applications shall be accepted or processed, and no further franchises shall be awarded, by the City except as hereinafter provided.

.030 Franchise Application Period. The application period for taxicab franchise applications shall be deemed open as of either (i) the date of adoption of a resolution of public convenience and necessity pursuant to subsection .040 below, (ii) the sixtieth day prior to the date of expiration of any existing franchise or Existing Permit, or (iii) the date any City Council decision terminating any existing franchise or Existing Permit becomes final. The term "Existing Permit" as used in this section shall have the meaning set forth in subsection .070 of Section 4.73.210 of this Chapter. The City Council may establish a deadline for the receipt of applications (the "application deadline") during any period that the application process is deemed open. Upon the receipt of one or more franchise applications prior to any application deadline established by the

City Council, the City shall accept and process such taxicab franchise applications in accordance with the provisions set forth in Section 4.73.050 of this Chapter, and shall award one or more additional taxicab franchises until the total number of taxicabs authorized by all taxicab franchises equals the number of taxicabs theretofore determined by the City Council to be required by the public convenience and necessity pursuant to subsection .040 below. Following the application deadline, the application period for taxicab franchises shall be deemed closed and no further applications for taxicab franchises shall be accepted, processed or awarded until the application period is reopened upon the occurrence of one of the events described above.

.040 Determination of Public Convenience and Necessity for Additional Taxicabs. The City Council, at its sole and absolute discretion, by motion duly adopted by the City Council, may periodically schedule a public hearing to determine, by resolution, whether the public convenience and necessity require the operation of additional taxicabs in the City of Anaheim. If the City Council determines that additional taxicabs are required, the resolution shall specify the number of additional taxicabs required. Said resolution shall constitute the resolution referred to in subsection .030 above. Any determination that the public convenience and necessity require the operation of additional taxicabs in the City shall be based upon the following findings:

.0401 That the additional taxicabs will not substantially impair the ability of the franchisees then currently holding taxicab franchises from the City, under efficient management, to earn a fair and reasonable return on their capital investments devoted to such taxicab service;

.0402 That the franchisees then currently holding taxicab franchises from the City, under normal conditions, are not adequately serving the reasonable taxicab needs in the City of Anaheim; and

.0403 That the additional taxicabs, together with the taxicabs then currently operated by franchisees holding taxicab franchises from the City, will not unduly congest, overburden, or interfere with any public street access or traffic flow, or any public or private parking, or any public or private taxi stands or taxi queuing areas, or otherwise create any danger or hazard to the public peace, health or safety.

The term "franchisees" as used in this subsection .040 shall include any person or entity lawfully operating under an Existing Permit as defined in subsection .070 of Section 4.73.210 of this Chapter.

4.73.050 APPLICATION FOR FRANCHISE.

Within any application period specified in subsection .030 of Section 4.73.045 of this Chapter, any applicant seeking to operate as a franchisee, or any then existing franchisee seeking to increase the number of taxicabs it is authorized to operate, may apply to the City by filing with the Code Enforcement Division of the Planning Department, upon forms supplied by the City and in accordance with the request for proposals issued by the City therefor, a verified application containing at a minimum the following information which shall be binding upon and enforceable upon the applicant in any franchise awarded pursuant to such application. Any application by an existing franchisee to increase the number of taxicabs it is

authorized to operate shall be deemed an application for a new and separate franchise for purposes of the processing of such application pursuant to this chapter.

.010 Name and address of applicant.

.0101 If the applicant is a corporation, the state of incorporation and the names and addresses the [sic] each officer thereof.

.0102 If the applicant is a partnership, the name and address of each partner shall be set forth in the application.

.020 A list of all vehicles, including license plate numbers and vehicle identification numbers, to be used in connection with the franchise for which the application is filed and the age of said vehicles.

.030 A list of all drivers who will operate a taxicab pursuant to such franchise, accompanied by the California drivers' license number and license class of each such person.

.040 Proof of insurance in a form acceptable to the City.

.050 Such other and further information as the Code Enforcement Manager may reasonably require to evaluate and process applications for the franchises to be awarded hereunder.

The requirements of this Chapter shall supersede the requirements of Chapter 1.03 of this Code with regard to taxicab franchise applications.

4.73.070 CRITERIA FOR GRANTING NONEXCLUSIVE FRANCHISE.

.010 Upon conclusion of the hearing on the application(s) for a franchise, or within a reasonable time not to exceed sixty (60) days thereafter, the City Council shall render its decision on the application(s). The nonexclusive franchise shall be granted or denied, based upon compliance with this chapter and the criteria established pursuant to subsection .020 of this section. Any grant of a franchise by the City Council may be subject to such terms, conditions, rules, regulations, restrictions and limitations as the City Council deems necessary or appropriate to protect the public health, safety or general welfare.

.020 The City Council may receive the recommendations of any current or future advisory body established by the City Council or the City Manager to examine and evaluate applications for a franchise and consider such recommendations in reaching its decisions. The City Council may accept, reject or amend any such recommendations. The criteria for evaluating applications for a franchise may be established by such evaluation body subject to the approval thereof by the City Council. The decision of the City Council upon the granting or rejection of any application for a franchise shall be final and conclusive.

.030 Should a franchise not be granted to an applicant, the City shall issue a notice of such to the applicant within fifteen (15) [sic] following the rejection of its application by the City Council.

4.73.210 EFFECT OF CHAPTER 4.73 UPON CHAPTER 4.72 AND OPERATOR'S PERMITS PREVIOUSLY ISSUED THEREUNDER.

.010 The provisions of Chapter 4.72 of Title 4 of the Anaheim Municipal Code shall be inoperative as of the date and time this Chapter 4.73 becomes effective and shall remain inoperative so long as the provisions of this Chapter 4.73 are in effect, except as otherwise expressly provided in this section.

.020 Upon the effective date of any franchise granted pursuant to this Chapter 4.73, any operator's permit theretofore issued to said franchisee pursuant to Chapter 4.72 of this Code shall be null and void, and without further force and effect, except as otherwise expressly provided in this section.

.030 Notwithstanding subsection .010 of this section, the provisions of Chapter 4.72 shall be operative and in full force and effect during any period the City is enjoined, restrained or otherwise prohibited by any court of competent jurisdiction from enforcing the provisions of this Chapter 4.73 requiring franchises for the operation of taxicabs or during any period an operator's permit issued pursuant to Chapter 4.72 is in effect pursuant to any provision of this section.

.040 Any operator's permit issued pursuant to Chapter 4.72, which permit is in effect on the date this Chapter 4.73 is adopted, shall be in effect, subject to compliance with all applicable requirements of Chapter 4.72 and the terms and conditions of said permit, during any period the City is enjoined, restrained or otherwise prohibited by any court of competent jurisdiction from

enforcing the provisions of this Chapter 4.73 requiring franchises for the operation of taxicabs.

.050 In the event any court of competent jurisdiction enters any order temporarily restraining, enjoining or prohibiting the operation of taxicabs by a franchisee pending final adjudication in any court action challenging the validity of said franchise or any provision of this chapter, any operator's permit theretofore issued to said franchisee pursuant to Chapter 4.72 of this Code, which permit was in effect on the date the ordinance approving said franchise was adopted, shall remain in effect during the period said court order is in effect provided that said permit and all taxicab operations thereunder shall comply with all applicable requirements of Chapter 4.72 and all terms and conditions of said permit.

.060 In the event any court of competent jurisdiction enters a final judgment declaring any franchise issued pursuant to this chapter to be invalid or unenforceable, or permanently enjoining the operation of taxicabs pursuant to said franchise, any operator's permit theretofore issued to said franchisee pursuant to Chapter 4.72 of this Code, which permit was in effect on the date the ordinance approving said franchise was adopted, shall remain in effect provided that said permit and all taxicab operations thereunder shall comply with all applicable requirements of Chapter 4.72 and all terms and conditions of said permit.

.070 Notwithstanding any other provision of this Chapter 4.73 to the contrary, any person or entity holding a valid operator's permit issued pursuant to Chapter 4.72 of this Code which permit is in effect on the date of adoption of this Chapter 4.73 (referred to herein as an "Existing

Permit") which person or entity either (i) is not awarded an Initial Taxicab Franchise pursuant to subsection .010 of Section 4.73.045 of this Chapter, or (ii) is awarded an Initial Taxicab Franchise but fails or refuses to timely comply with the provisions of Section 4.73.080 of this Chapter, may continue to operate under the provisions of said Existing Permit, and the applicable provisions of Chapter 4.72 shall continue to apply with regard to said Existing Permit, subject to the following:

.0701 Said Existing Permit shall be exercised and maintained in compliance with all applicable provisions of Chapter 4.72 of this Code and all terms and conditions of said Existing Permit; and

.0702 The maximum number of taxicabs authorized pursuant to said Existing Permit shall be reduced to thirty (30) vehicles effective as of midnight on May 31, 2002; and

.0703 Said Existing Permit shall expire and terminate in its entirety as of midnight on May 31, 2006.

.0704 Nothing contained herein shall prohibit the person or entity exercising any rights under said Existing Permit from applying for a taxicab franchise at any time a franchise application period is open pursuant to subsection .030 of Section 4.73.045 of this Chapter. Failure to apply for or obtain a franchise during the period said Existing Permit is in effect shall not affect said Existing Permit or the duration thereof."

(2)

No. 03-571

Supreme Court, U.S.
FILED
NOV 17 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SOUTH COAST CAB CO., INC.,
a California Corporation, et al.,

Petitioners,

vs.

CITY OF ANAHEIM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

RESPONDENT'S BRIEF IN OPPOSITION

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21 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether certiorari is appropriate to secure uniformity of decision between the federal and state courts to preserve Petitioners' Sherman Antitrust Act claim.

(2) Whether the City of Anaheim's status as a charter city exempts it, in the implementation of a local taxicab franchise ordinance, from Sherman Antitrust Act liability.

(3) Whether Petitioners may challenge the City of Anaheim's taxicab franchise ordinance on a constitutional basis even though Petitioners did not apply for a taxicab franchise.

(4) Whether evidence of alleged antitrust activity on the part of the City of Anaheim is relevant to the analysis of futility as an excuse for Petitioner's failure to exhaust its administrative remedies.

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SUMMARY OF ARGUMENT

The petition in this unremarkable state court appeal is by the unsuccessful plaintiffs challenging an order denying a preliminary injunction. In an unpublished opinion, the state Court of Appeal concluded that the state trial court did not abuse its discretion in denying the motion for preliminary injunction. The petition contends review is necessary because it is unclear what procedures must be followed in the award of franchises in the taxicab industry.

The petition should be denied for two main reasons: (1) it neither asserts an important federal question nor presents a necessity to secure uniformity of decision; and (2) it is unsupported by the facts and law.

Respondent City of Anaheim (City) files this Brief in Opposition only because the Petition contains factual and/or legal misstatements the City wishes to bring to the Court's attention. Nothing in the petition warrants a review by this Court.

On March 21, 2002, the trial court denied South Coast Cab's (SCC) motion for preliminary injunction holding: "The court will not invoke its equitable powers to dismantle the franchise system at the behest of a party who never even sought issuance of a franchise to it." (CT 778). SCC never applied for a taxicab franchise.

The Court of Appeal's opinion accurately recites the trial judge's findings and correctly applies the substantial evidence rule. The petition should be denied.

The City is still puzzled as to why there was no franchise application by SCC. There was no down side to SCC putting in a franchise application. If SCC's application

was denied, then it could have properly filed a writ of mandate action.

What SCC's owners subjectively believed is not relevant. Since SCC was so sure any application would be denied, it would not have had to do anything within two months under the City's Request for Proposal (RFP), except get the ten thousand dollars ($10,000) deposit back. There is nothing in the lengthy administrative record to indicate that the RFP requirements (newer cabs, etc.) had to be in place before SCC could even apply. SCC could have filed an application and simply stated it will comply with the requirements if it gets a franchise, but SCC did nothing.

SCC must first exhaust its administrative remedies. There is no rule that one must exhaust administrative remedies unless you have a subjective belief you will not win. That is what SCC is arguing because it continues to argue Petitioners believed this and Petitioners believed that. But Petitioners subjective beliefs are not relevant to the question of whether SCC exhausted its state administrative remedies.

The RFP requirements were straight forward. The administrative remedy here was to apply for a taxicab franchise. This case should not be decided on the subjective state of mind of SCC's owners.

SCC argues that the City was never going to give it a franchise, so it just filed its mandamus action in state superior court. Petitioners should not get very far with that writ action and in fact a judgment was entered for the City.

Petitioners argue *Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 112 Cal.Rptr. 761 (1974) supports their position that, if Petitioners knew SCC was not going to get a franchise, this excuses SCC not exhausting its state administrative remedies. However, the futility exception to exhaustion does not apply unless the petitioner *can positively state* that the administrative body has declared *what its ruling will be in a particular case. Sea & Sage Audubon Society, Inc. v. Planning Com.*, 34 Cal.3d 412, 418, 194 Cal.Rptr. 357 (1983). On the merits, substantive evidence supports the City's decision to move from a permit system to a taxicab franchise system.

STATEMENT OF THE CASE

1) City's Motion for Summary Adjudication

On April 2, 2002, the trial court granted summary adjudication (CT 792-797) stating in part:

> ". . . Plaintiffs claim for damages in their fourth cause of action for violation of the Sherman Anti-Trust Act has no merit because the Local Government Antitrust Act 'established as a general rule that **antitrust damages are not recoverable from any local government**.' *Opdyke Inv. Co. v. City of Detroit*, 883 F.2d 1265, 1266 (6th Cir. 1989). (Emphasis added); *California Governmental Tort Liability Practice*, 4th Ed., (2001), §9.77, pgs. 496-497."
>
> "FURTHER, Plaintiffs' third cause of action for violation of the Cartwright Act has no merit because the California Supreme Court held '[t]he actions of political subdivisions of the state, such as the City . . ., and the effects of such actions

are outside the scope of the [Cartwright] [A]ct.' *Blank v. Kirwan*, 39 Cal.3d 311, 323, 216 Cal. Rptr. 718, 725 (1985). Thus, municipalities cannot be sued as *defendants* under the Cartwright Act."

2) SCC's Motion for Preliminary Injunction

On March 21, 2002, the trial court ruled:

"The plaintiff moves this court to enjoin implementation of the recently-enacted taxicab franchise system. The application is denied for two reasons: 1) Plaintiff seeks to prevent franchises from operating under the ordinance because plaintiff contends the means by which the franchises were awarded, and/or the reason for the enaction of the ordinance, was in some manner biased against it. Ironically, however, as all agree, plaintiff never applied for a franchise. The court will not invoke its equitable powers to dismantle the franchise system at the behest of a party who never even sought issuance of a franchise to it. 2) The injunction would affect the important and substantial rights of entities not parties to this action."

(CT 778).

3) City's Motion for Judgment on the Pleadings

Attached as Exhibit C to SCC's opposition to the City's motion is the federal court order staying the federal case, entered on November 29, 2001 (CT 751) which states in part:

"Taxicab regulation is a matter best-suited to local regulation. The resolution of the state law

> issues is uncertain. The California Superior Court's decision could eliminate the need for resolution of the issues presented here. Also, this action presents the same facts and issues pending before the state court. A stay pending the ruling of the California Superior Court will preserve judicial economy. Defendant's Motion for a Stay is GRANTED."

On March 28, 2002, the trial court's order granting judgment on the pleadings (CT 780-782) stated:

> "State courts do not have jurisdiction to consider any claim under the Sherman Act or federal antitrust law. Federal courts have exclusive jurisdiction over all Sherman Act claims, and state courts are precluded from considering such claims. *United States Golf Association v. Arroyo Software Corporation*, 69 Cal.4th 607, 623-624, 81 Cal.Rptr.2d 708, 717-718 (1999)."

"IT IS THEREFORE ORDERED that the said motion for judgment on the pleadings is GRANTED and the fourth cause of action being only the only remaining cause of action the case is dismissed."

On April 17, 2003, the motion to consolidate state court appeals nos. G030079, G030551 and G031608 for purposes of decision was denied. On the same day, the state Court of Appeal affirmed the denial of SCC's motion for preliminary injunction. On May 19, 2003, SCC's Petition for rehearing was denied by the state court of appeal.

On July 16, 2003, SCC's Petition for review was denied by the California Supreme Court.

STATEMENT OF THE FACTS

On March 21, 2000, the City Council received the report of the *Ad Hoc* Committee and the independent consultant recommending that the current **taxicab permit procedure be replaced by ordinances awarding taxicab franchises** based upon new minimum service standards and recommending a competitive process for the award of the franchises. 2nd AR 144-145.[1] At a City Council meeting held March 21, 2000, John Poole, the City's Code Enforcement Manager, said that after many hours of study his department favored a franchise system because it delivered better service. 2nd AR 142. The City Council approved an agreement not to exceed $77,520.00 with the independent consultant to develop and assist in implementation of a taxicab franchising plan. 2nd AR 141-145. The *Ad Hoc* Committee held public meetings over the spring and summer of 2000. Members of the taxi industry participated and provided comment in the development of the franchising plan. 2nd AR 684. The *Ad Hoc* Committee endorsed the consultant's recommendations on July 11, 2000. 2nd AR 684.

On July 20, 2000, the City's consultant issued his report entitled "Anaheim Taxicab Franchise Development-Recommendations" wherein a franchise process was recommended. 2nd AR 210-260. Three franchises were recommended because: "**Three companies provide** a higher level of competition, more opportunity for fresh ideas and **opportunities for smaller companies** than would franchising of only two companies." 2nd AR 214.

---

[1] AR refers to Administrative Record.

The consultant's report stated that the City Council "may" want to consider a separate provision in the RFP giving existing companies an opportunity to continue to operate their current number of taxicabs (115 for Yellow Cab and 50 for A Taxi) provided they meet the franchise requirements, 2nd AR 214, 220, 809. But this provision was not a recommendation, 2nd AR 334. It was NEVER adopted by the City Council, 2nd AR 351-353, and was *not* included in the RFP. 2nd AR 857-870.

On August 8, 2000, the consultant presented his recommendations for a franchising plan to the City Council at a workshop. 2nd AR 202-209. Later that evening the City Council heard public comment on the franchising plan, Savvas Roditis spoke against the franchise, 2nd AR 286-288, and the Council continued the recommendation to August 29, 2000, 2nd AR 264, and denied SCC's latest application for a taxi permit based on a finding of "no public convenience or necessity." 2nd AR 261-266, 317-318. SCC applied for a rehearing and the item was placed on the August 29, 2000 City Council agenda.

On August 29, 2000, the City Council approved the franchising plan and directed staff to circulate RFPs for taxicab franchises which contained the components and criteria as recommended by the consultant. 2nd AR 329, 351-353. The benefit of moving to a franchise system included that it "raised the bar" in terms of service quality using a competitive process. 2nd AR 203.

Later that evening, on August 29, 2000, after SCC's counsel spoke in favor of granting SCC a rehearing on the denial of SCC's permit application, Councilman Feldhaus stated: ". . . **Mr. Roditis is welcome to again apply**

under that franchise [system] . . ." 2nd AR 357:21-358:28.

SCC's request for rehearing was denied. 2nd AR 359.

On September 20, 2000, the City sent out the RFP (2nd AR 857-870) for the selection of "up to three taxicab [franchises] who best meet the [RFP] requirements" to operate a total of 230 taxicabs to **replace the permit system**, 2nd AR 858, to which all taxicab companies were invited to apply, including SCC. The RFP clearly set forth that it would be released in September 2000 and that the *ordinances to award the franchises would be adopted later*, tentatively on December 19, 2000. 2nd AR 861. The RFP included procedures (2nd AR 860-863), general franchise requirements (2nd AR 864-866), and evaluation measures. 2nd AR 867-870. One hundred (100) points were possible made up of: 1) prior taxi experience (25 points) (two parts, one part being experience in operating taxicabs, the other experience in Anaheim); 2) financial stability (20 points); 3) quality of service (25 points). 2nd AR 867; 4) anticipated ability to meet and maintain performance standards (25 points). 2nd AR 868; and 5) clean fuel vehicles (5 points). 2nd AR 869.

Start-up provisions of the RFP required that each franchisee shall place 30% of the taxis into service within two months of the start of the franchise and 100% of their taxis into service within six months of start of the franchise. 2nd AR 864. Taxi vehicles could not be more than 7 model years of age [i.e., 1995] and in service as taxicabs for more than 5 years. 2nd AR 864. The RFP required that the response specify the number of taxicabs that the company proposed to purchase if it was awarded a franchise. 2nd AR 869.

Responses to the RFP were initially due on October 20, 2001, 2nd AR 858, and on October 17, 2000, the deadline was extended to October 30, 2000. 2nd AR 414-415. By the time of the October 30, 2000 deadline, the City received five responses: A Taxi Cab; American Taxi; Cabco Yellow dba California Yellow Cab; AM-PM Taxi; and Yellow Cab of North Orange County. SCC did NOT submit a proposal, even though no one knew, at that time, how the state Court of Appeal would rule on SCC's appeal in G026197.

When Savvas Roditis spoke against the taxi franchise on August 8, 2000, he stated: "I'm here tonight to speak about the franchise system. . ."

"My suggestion is ... I'm against that franchise system because you eliminate ... the smaller cab companies, to make a bid, to meet the requirements and get a [franchise] with the City of Anaheim ... ."

"So the franchise system is for the bigger companies ... ."

"So, I think we should stop it right here, the franchise system, and stay the way ... it is ... because we don't want to spend anymore money on the situation, and it's not gonna work."

"It's gonna work for these companies, ... they have the LPG or natural gas, or ... a computerized [dispatch] system. Most of the cab companies, right now, they have ... two-way radios, like, A Taxi, South Coast Cab, Orange County Yellow Cab, California Yellow Cab, and to put all the system ... you need at least three hundred thousand dollars ($300,000) to meet these requirements, and my

suggestion is, everything came up on those things just for me."

"Because I applied eight times for [a permit], and they know I have **to spend . . . three hundred thousand dollars ($300,000) to meet these requirements.**"

"So, please g[ive] this consideration and . . . stop it right now." 2nd AR 286:15-288:7.

Thus, SCC did not apply for a franchise because it did not want to commit to spending $300,000 if the City Council granted it a franchise. It did not want to "raise the bar."

When asked why SCC was not going to put in for a franchise, Mrs. Roditis testified at her deposition that: "You know who is going to get [the franchise]. American [Taxi] is going to get it. Why should I go through the expense?" (CT 589). "Why [SCC] going to []offer up for the franchise when they're going to give it to American [Taxi]." (CT 589). "[Y]ou have a cab company, it has the airport [franchise], it has CNG brand-new cars, is applying for the [franchise] in Anaheim, and they're not going to give it to them." (CT 589). "Q: So, was it your belief at that time, ma'am, and this was in September of 2000, that South Coast Cab couldn't compete with American Taxi for one of the franchises?" "A: Of Course." (CT 589). "Q: Because they had a bigger, newer fleet, [and] had the airport franchise?" "A: Yes." (CT 589).

Later, Mrs. Roditis testified that: "I know what it needs to run a cab company. And you see a cab company [American Taxi] popping out of the blue with brand-new vehicles and everything financed. Yeah, if you don't manage your finances and everything, you're going to go under.

I knew [American Taxi was] going to go under . . . . If you have a brand-new company popping out of the blue because they got the airport, it doesn't mean anything." Deposition, Page 107:14-108:4.

Franchises were eventually awarded to Yellow Cab, A Taxi and California Yellow.

ARGUMENT

I. THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW

Certiorari should be denied for the simple reason that this case presents neither an important question of federal law nor a necessity to secure uniformity of decision. The state Court of Appeal did not decide an important question of federal law in a way that conflicts with relevant decisions of this Court.

II. NO IMPORTANT QUESTION OF FEDERAL LAW

SCC contends certiorari is necessary because it is unclear what procedures must be followed in the award of franchises in the taxicab industry.

The Court of Appeal was correct in holding that:

"*O'Connor v. Superior Court*, 90 Cal.App.3d 107, 153 Cal.Rptr. 306 (1979) [city could compel existing taxicab permits holders to surrender old, transferable permits for new, nontransferable ones] is on point. If a city has the right to change from a transferable permit system as in *O'Connor* – that is, from a system where the permits have

an artificially created market value – to a system of nontransferable permits (thereby depriving the permit holder of a real tangible economic interest), it has the right, as here, to change from a nontransferable permit system to a franchise system." App. 11. The City's change from a permit system to a franchise system is not important question of federal law under U.S. Supreme Court Rule 10(c) that needs to be settled by this Court.

III. PETITION IS UNSUPPORTED BY FACTS AND LAW

Appellate courts reviewing the superior court's decision *always* apply a *substantial evidence* standard. *Fukuda v. City of Angels*, 20 Cal.4th 805, 824, 85 Cal.Rptr.2d 696, 708 (1999).

Where the superior court applied the *substantial evidence* test (no vested fundamental right involved), the appellate court's function is identical to that of the superior court: It will review the *administrative record* to determine whether the agency's findings were supported by substantial evidence, rather than limiting review to the trial court's findings. *Ryan v. California Interscholastic Federation-San Diego Section*, 91 Cal.App.4th 1048, 1077, 114 Cal.Rptr.2d 798, 821 (2001).

On a substantial evidence review the appellate court's opinion will state the facts in a manner that resolves all conflicts and *draws all inferences in favor of the prevailing party*. *Kotler v. Alma Lodge*, 63 Cal.App.4th 1381, 1383, 74 Cal.Rptr.2d 721, 723, fn. 1 (1998).

The opinion may describe evidentiary conflicts but is not required to do so. And it is not uncommon for a court to

ignore them and simply state the facts in the light most favorable to the prevailing party, particularly where the substantial evidence issue is the only one requiring an evaluation of the evidence. Such a factual statement is *not* a basis for certiorari.

The Court of Appeals's opinion need not address every point raised by the parties. The written opinion need only state the *essential facts* and briefly discuss the *essential legal issues*. *Lewis v. Sup.Ct. (Green)*, 19 Cal.4th 1232, 1263-1264, 82 Cal.Rptr.2d 85, 107-108 (1999).

The Court of Appeal concluded that: "If South Coast Cab were prepared to compete for a franchise, and simply wanted a level playing field, presumably it would have requested relief in the trial court seeking a mere modification of the evaluation criteria for the franchise system, not its wholesale overthrow. The fact that it didn't make such a request confirms what can be reasonably inferred from Savvas Roditis $300,000 remark: South Coast Cab didn't want to be part of any franchise system, and had pinned its entire hopes on being exempt from one." Opinion, page 13.

SCC has claimed this is a factual misstatement. Yet SCC could have sought this relief at the time it sought its preliminary injunction.

SCC also attacks the Court of Appeal's finding that: "The second allegation of favoritism concerns Cabco, which supposedly didn't immediately meet all the terms of its bid when it started operating. That point is refuted because the franchise ordinance itself gave each successful applicant two months to comply." Opinion, page 11, fn. 7.

Start-up provisions of the RFP required that each franchisee shall place 30% of the newer taxicabs into service within two months of the start of the franchise and 100% of their taxis into service within six months of start of the franchise. 2nd AR 864. Obviously, this included the computer in the taxicab itself. The RFP was incorporated into each franchisee's ordinance. AR2 3565-3579.

The Court of Appeal also stated: "Specifically, at a city council meeting in August 2000, Savvas Roditis indicated that he did not want to spend $300,000 to 'meet these requirements.' He was obviously referring to what South Coast Cab would be required to spend *if it first received a franchise."* Opinion, page 11.

SCC claims that the above factual recital has no basis in any testimony given by Savvas Roditis.

SCC overlooks the fact that Savvas Roditis spoke before the City Council on August 8, 2000, and stated: ". . . I'm against that franchise system . . . I think we should stop it right here, the franchise system, and stay the way . . . it is . . . because **we don't want to spend** anymore money on the situation . . . you need at least three hundred thousand dollars **($300,000) to meet these requirements** . . . I have to spend . . . three hundred thousand dollars ($300,000) to meet these requirements. So . . . stop it right now." 2nd AR 286:15-288:7 (emphasis added).

Thus, it is clear that SCC did not apply for a franchise because it did not want to commit to spending $300,000 if the City Council granted it a franchise. Further, the Court draws all inferences in favor of the prevailing party. *Kotler v. Alma Lodge*, 63 Cal.App.4th 1381, 1383, 74 Cal.Rptr.2d 721, 723, fn. 1 (1998).

If, as SCC's owners subjectively believed, the City was going to deny it a franchise, then SCC would not have to spend $300,000 or do anything else other than apply. SCC would only have to spend $300,000 if it was granted a franchise. There is nothing in the AR to support SCC's interpretation of the City's RFP. The RFP is clear that nothing had to be in place just to apply for a franchise.

The Court of Appeal correctly "confirm[ed] what can be reasonably inferred from Savvas Roditis $300,000 remark: South Coast Cab didn't want to be part of *any* franchise system, and had pinned its entire hopes on being exempt from one." Opinion, page 13.

SCC clearly misinterpreted the terms of the RFP as requiring immediate compliance. Petition, page 8.

Thus, the Court of Appeal was correct in: "conclud[ing] that the likelihood of success on the merits was so low – essentially the likelihood is nil . . . ." Opinion, page 6.

Lastly, the Court of Appeal in a separate proceeding, Case No. G030079, addressed the Sherman Anti-Trust Act issues. Opinion, page 8, fn. 3. In Case No. G030079, page 4, the Court of Appeal held:

> "It is safe to say that municipalities and their employees – at least insofar as those employees act within their 'official capacities' – are immune from damage claims under antitrust laws. The federal law explicitly says so. (15 U.S.C. §35(a)) ['No damages, interest on damages, costs, or attorney's fees may be recovered under [federal antitrust law] from any local government, or official or employee thereof acting in an official capacity.']) State law implicitly does. (See *People ex. rel. Freitas v. City and County of San Francisco*,

> 92 Cal.App.3d 913, 925-926, 155 Cal.Rptr. 319 (1979) [noting that it would be "illogical and unreasonable" not to include individual members of board of supervisors within scope of state antitrust immunity afforded cities].)"

The Court of Appeal held that two City employees were acting in an official capacity and the judgment dismissing them from the case was affirmed.

Given that the Court of Appeal's opinions, granting SCC's petition is hardly appropriate. The Court of Appeal's ruling is a rather mundane application of state law. Simply stated, nothing warrants granting the petition in this case.

CONCLUSION

The petition should be denied. However, SCC is not without a remedy. It is appealing the state court judgment in favor of the City (entered after the denial of SCC's motion for preliminary injunction) in Case No. G031608 and is also appealing to the Ninth Circuit the denial of its motion to reopen the federal case in Case No. SACV99-416GLT(ANx).

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Respectfully submitted,

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